IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-44

BARNES & TUCKER COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT.

Barnes & Tucker Company asks this court to note jurisdiction to review the judgment of the Supreme Court of Pennsylvania entered in the above case on February 28, 1977.[1]

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1. The Supreme Court of Pennsylvania had entered an earlier decision in this case which remanded the cause to the Commonwealth Court. Although the Supreme Court's decision did conclude certain issues against appellant, Barnes & Tucker did not then take an appeal to this Court because it might still have prevailed on the merits upon the remand to the Commonwealth Court. The entire cause having now been resolved, the earlier judgment of the Supreme Court of Pennsylvania may be treated as merged into the final judgment with respect to which review is here sought. *See, e.g.*, **Urie v. Thompson,** 337 U. S. 163 (1949).

OPINIONS BELOW.

The final opinion of the Supreme Court of Pennsylvania (**"Barnes & Tucker (II)"**) (A117-A130) [2] is reported at — Pa. —, 371 A. 2d 461 (1977). The opinion of the Commonwealth Court of Pennsylvania upon remand ("the remand opinion") (A98-A116) is reported at 23 Pa. Commw. Ct. 496, 353 A. 2d 471 (1976). The initial opinion of the Supreme Court of Pennsylvania (**"Barnes and Tucker (I)"**) (A70-A97) is reported at 455 Pa. 392, 319 A. 2d 871 (1974). The opinion of the Commonwealth Court following the hearing on this case ("the trial opinion") (A10-A69) is reported at 9 Pa. Commw. Ct. 1, 303 A. 2d 544 (1973). The opinion of the Commonwealth Court on the motion for preliminary injunction ("the preliminary injunction opinion") (A1-A9) is reported at 1 Pa. Commw. Ct. 552 (1971).

JURISDICTION.

This case arose on an amended complaint in equity against appellant brought by the Commonwealth of Pennsylvania on its own behalf and on behalf of the Department of Environmental Resources pursuant to the **Pennsylvania Clean Streams Law,** 35 Pa. Stat. Ann. §§ 691.1-691.1001 (A131-A163).

Direct appeal to this Court is taken from the judgment of the Supreme Court of Pennsylvania affirming the order of the Commonwealth Court of Pennsylvania making permanent a mandatory injunction under sections 2, 12 and

2. References to "A" pages are to pages in the appendix to this statement. References in the form "R. —a" are to pages in the Reproduced Record before the Pennsylvania Supreme Court in its initial consideration of this case; and references in the form "R. —b" are to pages in the Supplemental Reproduced Record which was added to the record before the Pennsylvania Supreme Court in its review of the remand decision.

16 of the 1970 amendments to the **Pennsylvania Clean Streams Law, Act of July 31, 1970,** P. L. No. 222, §§ 2, 12, 16, 35 Pa. Stat. Ann. §§ 691.3, 691.315(d), 601(a); (A135, A151, A157). Appellant argued in the courts below that the 1970 amendments were unconstitutional insofar as they retroactively required mine operators who had ceased operation before the passage of the amendments to abate any natural post-mining discharge occurring after the effective date of the amendments.

The Supreme Court of Pennsylvania entered its judgment on February 28, 1977 and denied appellant's timely petitions for reargument on April 6, 1977. Notice of appeal, a copy of which is attached at A164-A166, was filed with the Prothonotary of the Supreme Court of Pennsylvania for the Middle District on June 30, 1977.

This Court has jurisdiction pursuant to 28 U. S. C. Section 1257(2).

This appeal lies because the highest court of the Commonwealth of Pennsylvania has sustained the abatement provisions of the **Act of July 31, 1970** against a challenge that they are unconstitutional as applied to those mine operators who had ceased operation before the effective date of that act. **Cohen v. California,** 403 U. S. 15 (1971); **Warren Trading Post Co. v. Arizona Tax Commission,** 380 U. S. 685 (1965); **Dahnke-Walker Milling Co. v. Bondurant,** 257 U. S. 282 (1921).

QUESTIONS PRESENTED.

1. Does not a state statute violate the Due Process Clause of the Fourteenth Amendment when, under the guise of police power regulation of present mining activities, it imposes upon the former operator of a closed and now valueless mine, which had been operated and sealed without fault, the perpetual duty to treat water emanating from that mine by a retroactive declaration based merely on the fact that the operator had formerly operated the mine?

2. Even assuming that a state legislature may impose such a duty upon a former mine operator with respect to drainage generated in the mine it had actually operated, does not the statute violate the Due Process and Equal Protection Clauses when it imposes a perpetual obligation to pump and treat water that flows into that mine from other, uphill mines—the largest of which continues to operate with the knowledge that its unpumped mine drainage flows into the downhill mines—when the result is that five-sixths of the water treated comes from those other mines.

3. Assuming that the Constitution prohibits the state legislature from imposing retroactively upon a faultless former mine operator the duty to treat post-mining discharges, may the state courts impose that retroactive duty upon the former mine operator on a new theory of common law public nuisance—based in large part upon the regulating statute—without violating the Due Process and Equal Protection Clauses?

STATUTE INVOLVED.

The pertinent provisions of the 1970 amendments to the **Pennsylvania Clean Streams Law** are as follows:

Section 2. Section 3 of the act is amended to read:

Section 3. Discharge of Sewage and Industrial Wastes Not a Natural Use.—The discharge of sewage or industrial waste or any **[noxious and deleterious substances]** *substance* into the waters of this Commonwealth, which **[is or may become inimical and injurious to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation]** *causes or contributes to pollution as herein defined or creates a danger of such pollution* is hereby declared not to be a reasonable or natural use of such waters, to be against public policy and to be a public nuisance.

* * *

Section 12. Sections 315 and 316 of the act, added August 23, 1965 (P. L. 372), are amended to read:

* * *

[(d) Any permit approving the drainage and disposal of industrial wastes from a coal mine and issued by the board prior to the effective date of this act shall be deemed to be a permit issued pursuant to this section. The permit shall be valid for one year from the effective date of this act or for such additional period as the board might allow. Nothing herein shall limit the board's power to modify, suspend, or revoke any such permit under the provisions of subsection

(c) of this section] *Operation of Mines.—(a) No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the board or such person or municipality has first obtained a permit from the department. Operation of the mine shall include preparatory work in connection with the opening or reopening of a mine, backfilling, sealing, and other closing procedures, and any other work done on land or water in connection with the mine. A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1, 1966, under circumstances requiring a permit from the Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P. L. 372). The operation of any mine or the allowing of any discharge without a permit or contrary to the terms or conditions of a permit or contrary to the rules and regulations of the board, is hereby declared to be a nuisance. Whenever a permit is requested to be issued pursuant to this subsection, and such permit is requested for permission to operate any mining operations, the city, borough, incorporated town or township in which the operation is to be conducted shall be notified by registered mail of the request, at least ten days before the issuance of the permit or before a hearing on the issuance, whichever is first.*

• • •

Section 16. The title of Article VI and sections 601, 602, 605 and 609 of the act are amended to read:

ARTICLE VI
PROCEDURE AND ENFORCEMENT

Section 601. Abatement of **[Pollutions]** *Nuisances; Restraining Violations.—(a)* **[All pollutions hereinbefore declared to be nuisances or maintained contrary to the provisions of this act,]** *Any activity or condition declared by this act to be a nuisance,* shall be abatable in the manner **[now]** provided by law or equity for the abatement of public nuisances. In addition, suits to abate **[pollution of any of the waters of the Commonwealth]** *such nuisances or suits to restrain or prevent any violation of this act* may be instituted in equity or at law in the name of the Commonwealth upon relation of the Attorney General, or upon relation of any district attorney of any county, or upon relation of the solicitor of any municipality affected, after notice has first been served upon the Attorney General of the intention of the district attorney or solicitor to so proceed. Such proceedings may be prosecuted in the **[court of common pleas of Dauphin County]** *Commonwealth Court,* or in the court of common pleas of the county where the **[nuisance has been committed, or of any county through which or along the borders of which flows the water into which such pollution has been discharged at any point above]** *activity has taken place, the condition exists, or the public affected,* and to that end jurisdiction is hereby conferred in law and equity upon such courts: Provided, however, That no action shall be brought by such district attorney or solicitor against any municipality discharging sewage under a permit of the board heretofore issued or hereafter issued under this act: And provided further, That, except in cases of emergency where, in the opinion

> of the court, the exigencies of the cases require immediate abatement of said nuisances, the court may, in its decree, fix a reasonable time during which the person or municipality responsible for the nuisances may make provision for the abatement of the same.

The entire Act of July 31, 1970, P. L. 222, is reprinted in the appendix hereto at pages A131-A163.

STATEMENT OF THE CASE.

The Facts of the Case.

Appellant is the former operator of Mine No. 15, a self-contained deep bituminous coal mine located, along with several other independently owned mines, in an area of Pennsylvania known as the Barnesboro Basin, under mineral leases covering the "mineable" and "merchantable" coal in that mine.[3] Most of the mine's approximately 6,600 acres are located in the lowest part of the Basin (9 Pa. Commw. Ct. at 4-5, 303 A. 2d at 545-46; A11-A12).

Mine No. 15 was first operated in 1916 and continued under several different operators until being taken over by appellant in 1939 (9 Pa. Commw. Ct. at 5-6, 303 A. 2d at 546; A12-A13). The trial court found, and the court below accepted, that there is "no credible evidence in this case that Mine No. 15 was not operated and eventually closed consistent with statutory law, regulation or licenses pursuant thereto." (9 Pa. Commw. Ct. at 58, 303 A. 2d at 572; A65).[4] For the twenty-one years before the mine was closed, the state had required drainage permits, and appellant had obtained them. These permits never imposed a duty on appellant to make provision for post-mining discharge or, indeed, to treat discharge which occurred during and as a result of mining operations. Until passage of the 1965 amendments to the **Clean Streams Law**, Pennsylvania law did not proscribe, and appellant's mining per-

3. While there were neither evidence nor findings of Barnes & Tucker's continuing property interest in Mine No. 15, the Commonwealth itself has treated Barnes & Tucker as generally having had only a limited sub-surface interest. Brief for Appellant in the Supreme Court of Pennsylvania at No. 20, May Term 1974 (**Barnes & Tucker (I)**), Appendix B.

4. In its initial decision in this case, the Pennsylvania Supreme Court found to be "supported by the record" and, therefore, binding upon it, the Commonwealth Court's factual findings. (455 Pa. at 404, 319 A. 2d at 878; A81).

mits specifically authorized, the discharge of acid mine drainage without treatment into already polluted streams (9 Pa. Commw. Ct. at 8-10, 303 A. 2d at 547-48; A15-A17).

In 1965, the Pennsylvania legislature amended that state's **Clean Streams Law** to regulate for the first time the discharge of mine drainage into polluted streams. Those amendments, however, related only to discharge from the operation of a mine, and not to post-mining discharge. 35 Pa. Stat. Ann. §§ 691.1, 691.307, 691.315. Although the amendments contained language which may have justified the issuance of permits conditioned on making provision for the treatment of post-mining discharge, no such condition was contained in any permit issued for Mine No. 15.

The evidence was not disputed that, had Mine No. 15's operators been able to anticipate a future liability for post-mining drainage, they could and would have employed different mining techniques (R. 1012a-14a; 1082a-84a; 1145a(52)-(53)). It was equally clear that the mining after the 1965 amendments was not the cause of the post-mining discharge (9 Pa. Commw. Ct. at 7, 303 A. 2d at 547; A14).

There was still mineable coal in areas of Mine No. 15 on May 10, 1969, when appellant ceased to operate the mine because "it could not economically afford to pump and treat the water that it would have to pump from the mine to continue to operate the mine." [5]

5. The Commonwealth Court did not determine whether appellant had conducted its post-January 1, 1966 winding down operations pursuant to a statutorily authorized extension of its earlier permit or under a new permit granted after the effective date of the 1965 Amendments, and the Supreme Court held the distinction to be immaterial. (455 Pa. at 409-10, 319 A. 2d at 880-81; A86-A87). However, the Commonwealth Court did find that the last two extensions of time granted as to the original permit were issued with full knowledge that Barnes & Tucker was then in the process of discontinuing the operation of Mine No. 15, and that

The sealing of Mine No. 15 was completed in accordance with the requirements of the Department of Mines and Mineral Industries of the Commonwealth which, at that time, required the exclusive use of an air seal or one which "will allow water to flow out of the mine. . . ." (9 Pa. Commw. Ct. at 8, 303 A. 2d at 547; A15). See Section 2(2) of the **Coal Mine Sealing Act of 1947, Act of June 30, 1947,** P. L. 1177, 52 P. S. § 28.2(2).

In late June, 1970, almost a year after it had been sealed, an acid discharge was discovered breaking through the ground at the northeastern end of the mine, caused by the rising waters in the mine. After several attempts to relieve the discharge, appellant reopened a pumping facility at Duman Dam, at the southwest end of the mine and installed facilities there to treat the mine drainage. The Duman Dam facility was, and still is, operated to bring the water level in Mine No. 15 below the breakout areas at the northeast end of the mine (9 Commw. Ct. 19-24, 303 A. 2d at 552-55; A26-A32). Because of the large volume of water presently flowing into and accumulating in Mine No. 15, it is now impossible to seal it perfectly from adjoining mines or to seal it against a possible breakout (23 Pa. Commw. Ct. at 502, 353 A. 2d at 474-75; A102-A103).

Of the 7.2 million gallons of water accumulating in Mine No. 15 which must be pumped and treated each day in order to prevent a renewed breakout of acid drainage, six million gallons are attributable to the influx of fugitive waters generated in adjacent mines. (**Barnes & Tucker (II),** 371 A. 2d at 465; A124-A125). The trial court

5. (Cont'd.)
the Commonwealth was possessed of sufficient information at that time to assure, in its grant and conditioning of authority, that the statutory law and regulations then in effect would be fully complied with, yet did not impose any post-mining treatment responsibilities upon appellant (9 Pa. Commw. Ct. at 16, 18-19, 303 A. 2d at 551, 552; A23-A24, A25-A26).

did not attempt to allocate the six million gallons per day of fugitive inflow into Mine No. 15 among the neighboring mines in the complex. Nevertheless, it did find that the still actively operating Colver Mine, which on May 23, 1966 had been discharging 9.48 million gallons per day, was, by the time of trial, discharging "over 6 million gallons per day less than the earlier date, at a time when less mining and pillaring had been done in the mine." (23 Pa. Commw. Ct. at 507, 353 A. 2d at 477; A108). That is, the Colver Mine had reduced its pumping to some three or three and one-half million gallons per day. Moreover, the Commonwealth Court found that Colver's termination of pumping had resulted in the accumulation of a three billion gallon pool pressing against the lower barrier of the Colver Mine where it abuts Mine No. 15 with a head of water of between 178 and 200 feet at the time of trial (*Id.*).[6]

Although the trial court found that substantially less water would need to be pumped to prevent a breakout were it not for the influx of fugitive waters, it made no finding as to whether or not the outbreak would have occurred without that influx (23 Pa. Commw. Ct. at 508, 353 A. 2d at 478; A109), despite the fact that appellant presented substantial testimony that it would not have (R. 1108a-12a; 1114a-15a; see R. 639a, 646a, 1108a-09a). In any case, the trial court found that the only way to prevent future outbreaks, now and for the foreseeable future, would be to pump and treat 7.2 million gallons of water per day, five-sixths of which originates in mines over which appellant never has had any control whatsoever, at a present monthly cost of between $30,000 and $50,000, which duty and cost both the trial court and the court below imposed on appellant (23 Pa. Commw. at 508, 353 A. 2d at 478; A109-A110).

6. While the Commonwealth Court noted the expectation of the Colver Mine owners at the time a decision was made to reduce pumping that the excess drainage would flow into the Sterling Mine Complex, the quantity of sandstone in the area, "which would act like a pipeline for the transference of mine water," and the existence of cut throughs, pillarings and breached barriers between the Colver and Sterling Mines and Mine No. 15 would make it inevitable that a substantial portion of this drainage would find its way into Mine No. 15 (23 Pa. Commw. Ct. at 505-07, 353 A. 2d at 476-477; A106-A109).

The Preliminary Injunction Opinion.

After the breakout, appellant's existing pumps at Duman Dam had been modified to provide for treatment of acid drainage and reopened under a stipulation between appellant and the Commonwealth on August 26, 1970. When the agreement between the parties concerning the operation of the treatment facilities broke down, the question of discharge from Mine No. 15 was presented to the Honorable James Bowman of the Commonwealth Court in a preliminary injunction proceeding. On April 13, 1971, President Judge Bowman issued a preliminary mandatory injunction under which appellant was required to operate the Duman Dam treatment facilities and appellant and the Commonwealth were required to split the cost of that operation, all pending the resolution of the legal question of who should pay the treatment costs. 1 Pa. Commw. Ct. at 560-61; A8-A9.

From the time of the Commonwealth Court's preliminary injunction, which determined that the discharge from the mines in the Barnesboro Basin produced substantial additional pollution in the waters of Pennsylvania, to the present, there has been no question that the Duman Dam treatment facility should and will be operated. The question is, as it has been, one of who should pay for the cost of that operation. The Commonwealth has insisted, and the courts below have eventually decided that, under the 1970 amendments to the **Clean Streams Law,** the

burden should fall on appellant. Appellant urges that the burden is on the Commonwealth to treat the discharge from Mine No. 15, as from most other mines abandoned prior to the 1970 law, and that the Constitution prohibits the Commonwealth from shifting that burden onto appellant merely because it was the last operator of Mine No. 15.

The Trial Decision.

After twelve days of hearings, and upon a record of 1400 pages of testimony and more than 250 exhibits, the Commonwealth Court rejected every one of the four different legal theories proposed by the Commonwealth as a basis upon which to issue a permanent injunction compelling appellant to treat post-mining acid drainage from Mine No. 15 until such time, if ever, that the water achieved prescribed quality standards.

After dispensing with two arguments not here in issue, the court refused to find that the Commonwealth had stated a cause of action for either statutory or common law nuisance. With respect to the first, it held that the drainage from Mine No. 15 did not constitute a nuisance under the **Clean Streams Law** "as then in effect." (9 Pa. Commw. Ct. at 60, 47, 303 A. 2d at 572, 566; A67). As to the existence of a common law nuisance, the court concluded (9 Pa. Commw. Ct. at 58-59, 303 A. 2d at 572; A66):

> "Considering the legislative history, the lawful operation and closure of Mine No. 15 at all times and the other salient facts of this case, we cannot today declare—solely for the reason that B & T and its predecessors created a subsurface artificial condition by reason of mining—that a breakout of mine water through the forces of nature at work adjunctive to said artificial condition constitutes a public nuisance for which B & T is responsible today."

Barnes & Tucker (I).

The Pennsylvania Supreme Court accepted the trial court's findings of fact (455 Pa. at 404, 319 A. 2d at 878; A81), and agreed with its conclusions of law as to two of the Commonwealth's two theories of liability. However, it found that relief could be granted on the basis of either statutory or common law nuisance. The court first declared a statutory remedy to be available under the 1970 amendments to the **Clean Streams Law,** which were adopted after appellant had abandoned Mine No. 15 (455 Pa. at 409-10, 319 A. 2d at 880-81; A85-A87), holding that its action did not give the 1970 amendments retroactive effect since, *inter alia,* the condition sought to be abated, if not the acts which caused it, occurred after the amendments (455 Pa. at 417-18; 319 A. 2d at 884-85; A94-A95).[7] In the alternative, it held that liability could be premised on a finding of common law public nuisance despite the "absence of facts supporting concepts of negligence, foreseeability or unlawful conduct." (455 Pa. at 414, 319 A. 2d at 883; A91).

Nonetheless, the Court recognized that under the rule of **Lawton v. Steele,** 152 U. S. 133 (1894), the imposition of liability upon appellant might still weigh so oppressively and so exceed the parameters of reason as to constitute a "taking of property." (455 Pa. at 418-19, 319 A. 2d at 885; A95-A96). Accordingly, it remanded the cause to the Commonwealth Court to determine, first, the precise nature of relief which would be warranted and second, whether the imposition of such relief would be within constitutional limits.

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7. The court assumed that the 1970 Amendments were applicable only to "those post-mining discharges where mining operations have occurred subsequent to January 1, 1966, under conditions requiring a permit pursuant to Section 315(b) of the 1965 law . . . ," but rejected appellant's contention that its operations conducted pursuant to an extended pre-1965 permit did not satisfy this condition (455 Pa. at 409-10, 319 A. 2d at 880-81; A86-A87).

The Remand Decision.

Addressing itself to the first remand issue, the Commonwealth Court found that, in order to prevent an outbreak of acid drainage, it would be necessary to pump from the mine and to treat approximately 7.2 million gallons of water per day for the indefinite future, at a cost of between $30,000 and $50,000 per month (23 Pa. Commw. Ct. at 502, 508, 353 A. 2d at 474-75, 478; A103, A109-A110).

The court then proceeded to consider "whether the only abatement relief order that can be fashioned by this Court would equate an unconstitutional taking of property of appellant or be beyond the 'parameters of reason' . . . ." (23 Pa. Commw. Ct. at 503, 353 A. 2d at 475; A103). In holding that it would not, the court relied on the theory that because appellant did not introduce evidence of its general "capital structure, assets and liabilities or its profits or losses," it had failed *a priori* to sustain its burden of showing the order to be unduly oppressive or unreasonable in constitutional terms (23 Pa. Commw. Ct. at 511-12, 353 A. 2d at 480; A113).

Despite its factual finding that, of the 7.2 million gallons of water per day which appellant would have to pump and treat, only "approximately 1.2 million gallons per day are attributable to water generated in Mine No. 15 while approximately six million gallons per day are attributable to fugitive mine water generated in other mines in the complex and finding its way into Mine No. 15," 23 Pa. Commw. Ct. at 508, 353 A. 2d at 478; A109, the court held that, despite the magnitude of the liability imposed upon appellant, the absence of proof that appellant's activities were the proximate cause of the discharge did not even raise an issue of constitutional dimensions (23 Pa. Commw. Ct. at 509-10, 353 A. 2d at 478-79; A110-A112).

Barnes & Tucker (II).

In affirming the Commonwealth Court's conclusion that the remedy imposed was not unconstitutional, the court below rejected out of hand appellant's argument that, since the economic effects of Pennsylvania's environmental legislation had already driven appellant's mine out of business, the imposition in addition of an affirmative duty to pump and treat drainage from that mine constituted an unconstitutional taking (371 A. 2d at 464; A123).

Moreover, instead of concentrating on the constitutional question it had framed in **Barnes & Tucker (I)**, that is, "whether the Commonwealth's [otherwise valid] use of such power in this case would be unduly oppressive upon Barnes and Tucker . . . ." (455 Pa. at 419, 319 A. 2d at 886; A97), the court devoted the greatest part of its opinion to the question of whether the method chosen by the Commonwealth to abate a declared nuisance constituted a reasonable exercise of the police power, a question presumably already decided in favor of the Commonwealth in its earlier opinion (*id.* at 418-19, 319 A. 2d at 885-86; A96). Indeed, the court considered appellant's due process arguments in the context of a holding that since it had found the Commonwealth to be "validly employing its police power in a reasonable manner to abate the immediate public nuisance, there can be no finding of an unconstitutional 'taking' by the imposition of the present abatement order, despite the impact this exercise of the police power may have on appellant" (371 A. 2d at 467; A128).

Again, the court below was not swayed by appellant's argument that it was unduly oppressive to require it to treat water originating largely in unowned, adjacent independent mines, because it found that statute to be

directed, not to the source of the polluted water itself, but to the source of the discharge (371 A. 2d at 466; A126-A127). Finally, the court "noted" appellant's failure to adduce additional evidence that there was an alternative means of abating the nuisance or that the remedy imposed was "unduly oppressive due to its economic impact" (371 A. 2d at 468; A129), without discussing appellant's contention that there was already evidence in the record sufficient to establish an unconstitutional taking.

THE ISSUES ARE SUBSTANTIAL.

The present appeal brings before this Court the increasingly critical conflict between the efforts of the states to impose upon users of land the duty to restore the environment and the constitutional limitations on the right of state governments to impose upon their citizens burdens so great that they constitute a taking of property without just compensation, an issue which is particularly sharply focused when, as here, the state seeks to apply its environmental legislation retroactively.

It first raises the question of whether a state statute violates the Due Process Clause of the Fourteenth Amendment when it imposes potentially limitless liability without fault upon appellant, the former operator under mineral leases of an abandoned coal mine, for unforeseeable post-mining acid discharge from that closed mine. More specifically, it asks reversal of the decision of the Supreme Court of Pennsylvania that the 1970 amendments to the **Clean Streams Law** do not affect a "taking" prohibited by the Due Process Clause when they retroactively imposed a perpetual duty upon appellant, the former mine operator, to pump and treat water from its former mine, at a cost of $360,000 to $600,000 per year, despite the facts accepted by the court below that: (1) appellant had operated that mine at all times lawfully, without negligence and, for the twenty-one years before abandonment, in accordance with drainage permits issued by the state, (2) these permits had expressly authorized discharge of mine drainage without treatment and contained no requirement that appellant pump or treat post-mining drainage, (3) appellant abandoned and sealed the mine in accordance with the only method permitted by state law, a method intentionally designed by the state to allow post-mining discharges should water accumulate in the sealed mine,

(4) appellant had abandoned that mine because newly enacted environmental regulations made it economically unfeasible for appellant to remove the coal still left in the ground, (5) appellant has no interest in its former mine against which to charge the cost of pumping and treating that mine discharge, (6) there is no way that appellant can now seal the mine to prevent the natural discharge of mine water, (7) that discharge broke out from an area near the surface which had been mined by a previous operator before appellant had obtained any interest in the now abandoned mine and (8) at the time it abandoned and sealed that mine, appellant could not have foreseen that a post-mining discharge would occur.

Second, this appeal raises the question of whether the state legislature did not violate both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment when it imposed upon appellant sole responsibility for the pumping and treatment of drainage from appellant's former mine despite a finding that five-sixths of that drainage was generated in mines in which appellant had no interest and over which it had no control. More explicitly, it asks whether the state may cause appellant to pump and treat 7.2 million gallons of mine water daily when six million gallons of that water flow into appellant's former mine from other abandoned mines and from an active uphill mine whose owner and operator, faced with the same environmental requirements which caused appellant to abandon its mine, chose to decrease their own pumping activity and to allow a three billion gallon pool of mine water to accumulate against the barrier between their mine and appellant's and other abandoned mines, with the knowledge that this accumulated water would flow into appellant's or other connecting mines.

The burden which has been imposed upon appellant by the retroactive provisions of the 1970 amendments to

Pennsylvania's Clean Streams Law as authoritatively interpreted by the Supreme Court of Pennsylvania is unprecedented both in nature and in scope. The basis for this appeal is that if there exist any circumstances under which purely economic state regulation enacted under the police power will be found to exceed constitutional limits, those circumstances are present in this case and demand reversal of the order of the court below.

1. This Case Presents an Unwarranted and Unprecedented Ruling That a State Does Not Take Property in Violation of the Due Process Clause of the Fourteenth Amendment When That State Regulates a Citizen's Property in a Fashion That Gives It a Substantial Negative Value Despite the Fact That That Citizen Neither Is Presently Using That Property Nor Ever Used It Unlawfully.

Only in 1970, after appellant had abandoned and sealed Mine No. 15 in accordance with all applicable regulations, did Pennsylvania enact the legislation here challenged, which made post-mining discharge a public nuisance and required mine operators to make provision for the treatment of post-mining discharge. That legislation, however, was made applicable not merely to mines which continued to operate after the date of the 1970 legislation, but also to any mine which had operated within permit requirements after January 1, 1966.

Some months after the 1970 legislation, a natural breakout of drainage from Mine No. 15 occurred. It is to prevent a recurrence of this natural breakout—and not to permit the operation of Mine No. 15—that the courts below imposed upon appellant the duty to pump and treat 7.2 million gallons of water daily from Mine No. 15 at an annual cost of $360,000 to $600,000. It is undisputed that

there is no foreseeable end to the duty to pump and treat this water and that appellant neither gains any benefit from the pumping and treatment nor has any other way to recoup its costs from Mine No. 15.

In order to justify the application of the 1970 legislation to appellant against the challenge that the state was retroactively imposing a duty upon appellant, the court below concluded that the state was seeking to regulate not past conduct, but the present discharge from Mine No. 15. Similarly, the court developed a novel theory of nuisance law, based largely on the 1970 amendments, which held that a former mine operator could be liable for post-mining discharges despite both the fact that the mining had been done under state-issued permits which required no water treatment during or after mining and at a time when no law required such treatment and the further fact the discharges were not related to any present mining activity. Indeed, the court seems to argue that the very need for and existence of the unconditional permits were evidence that the mine drainage had been recognized as a public nuisance.

Appellant readily concedes that the state has the right to regulate discharges related to an active mining operation. If an operator wishes to continue mining he must pay the environmental costs. If he cannot afford to pay the costs, he may have to abandon his operations. Moreover the state may impose on a current operator the duty to make provision for the treatment of post-mining discharge. Once again, the operator can avoid the duty by abandoning the operation on or before the effective date of the statute imposing the new duty. The state may impose on former operators the duty to treat post-mining discharge when the former operator has operated his mine negligently or in violation of law. The state even has the right to go upon a former operator's property to seal a

breakout or to pump and treat a discharge from an abandoned mine.

What the state may not do without running afoul of the Due Process Clause, however, and what the court below has permitted Pennsylvania to do in this case, is to impose retroactively upon a former mine operator a duty to treat mine drainage even, in the court's own words, in "the absence of facts supporting concepts of negligence, foreseeability or unlawful conduct." (**Barnes & Tucker (I)**, 455 Pa. at 414, 319 A. 2d at 883; (A91).

The reason is obvious. If the state gives advance warning of the environmental rules of the game, the would-be mine operator can decide in advance whether to open a coal mine, and how. He can determine whether the potential profits from a mine will repay the restoration costs. He may leave more coal in place as barriers to prevent future breakouts and may seal his mine better from those of his neighbors. But, by the time the 1965 amendments were adopted, it was already too late for appellant—or its predecessors—to plan to develop Mine No. 15 in a way that would prevent post-mining discharge. Indeed, as the trial court found, it would not have prevented the breakout if appellant had not mined one ton of coal after the 1965 Act. And it was not even the 1965 amendments, but the 1970 amendments, enacted after Mine No. 15 was closed and sealed, which impose upon appellant the duty to treat post-mining discharge.

The 1970 amendments were made retroactive more than four and one-half years. Mine operators were finally warned on July 31, 1970 that from January 1, 1966 they had mined at their peril of treating post-mining discharges whether or not the state had imposed that requirement in the permits it had issued them. And if it is constitutional for the legislature to impose this burden on mines which closed between 1966 and 1970, why not equally on those

which ceased operation between 1945 and 1965—or even earlier? There is no bar but the grace of the legislature if the Constitution does not protect against retroactive regulation.

Moreover, if the burden of treating post-mining discharges from Mine No. 15 is imposed on appellant rather than the Commonwealth, appellant cannot go back to the customers who bought coal from that mine and collect a higher price for that coal to cover the previously unforeseen costs of operating the Duman Dam treatment facility in perpetuity. Unless the Commonwealth bears the cost of the treatment facility that burden will fall permanently and completely on appellant.

In determining that the imposition on appellant of this perpetual duty to pump and treat water from Mine No. 15 did not constitute an unconstitutional taking, the Pennsylvania Supreme Court announced a theory of law in direct opposition to numerous decisions of this Court: "given our determination that the Commonwealth is validly employing its police power in a reasonable manner to abate the immediate public nuisance, there can be no finding of an unconstitutional 'taking' . . . despite the impact this exercise of the police power may have on appellant." (**Barnes & Tucker (II)**, 371 A. 2d at 467; A128).[8]

This Court has always held that a police power regulation, no matter how useful or necessary, may become a taking in extreme circumstances. The leading case is **Pennsylvania Coal Co. v. Mahon,** 260 U. S. 393 (1922). In that case, the Court recognized that the police power normally operates as an implied limitation on the use of

8. In this context, the finding of the court below that the state was using its police power "in a reasonable manner" plainly looks to the court's determination that pumping and treatment at Duman Dam were necessary to prevent the undesirable acid discharge, not that the costs were not unduly burdensome on appellant. To read this phrase otherwise would be to make it assume its conclusion.

private property, but held, in striking down the regulation there involved, that when the burden on private property "reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 413. Justice Holmes' warning in 1922 was prophetic: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

The Court in **Mahon** did not attempt to quantify the exact point where compensation becomes due, but held only that the limits of the police power have been breached where there is a total confiscation of property value.[9] No uniform rule has since been established; however, it is still true, as noted in **Queenside Hills Realty Co. v. Saxl,** 328 U. S. 80, 83 (1946), that the "extreme cases," the cases which mark the furthest reach of the police power, involve the prohibition only of certain uses of property, albeit the most profitable, and do not involve the destruction of all property value. *See, e.g.*, **Hadacheck v. Sebastian,** 239 U. S. 394 (1915) (prohibiting brickmaking within portion of city); **Reinman v. Little Rock,** 237 U. S. 171 (1915) (prohibiting operation of livery stable within city); **Pierce Oil Corp. v. City of Hope,** 248 U. S. 498 (1919) (prohibiting storage of gasoline in proximity to dwellings).

In its most recent decision in this area, in **Goldblatt v. Town of Hempstead,** 369 U. S. 590 (1962), this Court again found it unnecessary to determine exactly "where regulation ends and taking begins," *id.* at 594, because there was no evidence to suggest that the regulation in that case

9. Noting that "the right to coal consists in the right to mine it," this Court held in **Mahon** that "[t]o make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." 260 U. S. at 414.

which prohibited further excavation from a portion of a gravel pit would even reduce the value of petitioner Goldblatt's property. Nonetheless, the Court again recognized that there was a point at which governmental action in the form of otherwise valid regulation might be "so onerous as to constitute a taking which constitutionally requires compensation." 369 U. S. at 594. Parenthetically, the Court never reached the question of whether that part of the ordinance which required Goldblatt to refill his worked-out gravel pit—the portion most nearly resembling the burden imposed on appellant here—was unconstitutional, since that provision was not before the Court. 369 U. S. at 597-98.

In each of these cases, the Court was faced with the question of whether the regulation was so burdensome that it constituted an actual taking of property. Except in **Mahon,** none of the property owners was able to show that the value of his property had been totally destroyed. No such difficulty exists, however, in this case.

Appellant is merely the former operator of an abandoned coal mine under mineral leases. There is no other use for these leases but the mining of coal. In this case, appellant had given up its mining operations because "it could not economically afford to pump and treat the water that it would have had to pump from the mine to continue to operate the mine." (9 Pa. Commw. Ct. at 7, 303 A. 2d at 547; A14). Thus, the property was plainly without any value before the state undertook to impose upon it regulations which would make it cost its former operator $360,000 to $600,000 per year in perpetuity. In other words, this case goes beyond any case ever presented to this Court in that the state action here involved does not merely totally destroy the value of appellant's property, it makes that property a perpetual expense to appellant. And it does not do so under a theory based on fault, because there was none; rather, it does so under the guise of a police power regulation.

This Court in **Mahon** held that an unconstitutional taking may occur when state regulation destroys the economic value of a property. How much more so when that regulation imposes a negative worth upon a property so that its holder cannot even abandon that property to the state as if there had been a taking.[10]

It is in accord with the purpose of regulation to require that each economic enterprise bear its own costs and that, if the cost associated with a particular use, properly regulated, is too great, then that use should be abandoned. However, this is the limit of justifiable economic regulation. Thus, in **Erie Railroad Co. v. Board of Public Utility**

10. The court below did not address itself to any discussion of the economic impact of the regulation in this case upon appellant, simply rejecting out of hand appellant's argument that the state cannot impose a positive burden on a property whose value had already been destroyed by that regulation, 371 A. 2d at 464; A123, and noting that appellant had not offered additional evidence that the regulation "was unduly oppressive due to its economic impact," *id.* at 468; A129.

The trial court, by contrast to the court below, based its refusal to find a "taking" on appellant's failure to introduce evidence "of its capital structure, assets and liabilities or its profits or losses, if any." 23 Pa. Commw. Ct. at 512, 353 A. 2d at 480; A113. The court refused to find a taking merely based on the cost of the Duman Dam pumping and treating operation, arguing that appellant would be thus "effectively isolating this cost from the relative economic impact thereof upon its corporate assets and profits." *Id.*; A114. Yet this is precisely what is involved in eminent domain cases where there is an actual taking. A state must compensate the owner of condemned property regardless of his other assets. Certainly the same rule applies to a regulation which destroys a citizen's property. It is an unconstitutional taking whether or not the victim of the taking has other assets from which he can recover his losses or, in this case, pay the charges against the regulated property. Appellant need not wait until these charges have destroyed any other assets it may have before it can seek redress from the regulation here involved. *Cf.* **Union Oil Co. v. Morton,** 512 F. 2d 743 (9th Cir. 1975) (regulation prohibiting construction of one of three drilling platforms on oil lease constituted taking).

Commissioners, 254 U. S. 394, 411 (1921), the Court, again by Justice Holmes, upheld a law requiring the railroad to eliminate grade crossings at its own expense upon the rationale that "[i]f the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce." Similarly, this Court has countenanced police power restrictions on certain uses of property on the basis that " '[s]uch legislation does not disturb the owner in the control or use of his property for lawful purposes, *nor restrict his right to dispose of it.* . . .' " (Emphasis supplied). **Goldblatt** *supra,* 369 U. S. at 592-93, quoting from **Mugler v. Kansas,** 123 U. S. 623, 668-69 (1887).

Barnes & Tucker has plainly been deprived of the right to dispose of its property because, as a result of Pennsylvania's actions, that property is not only commercially without value, it is encumbered in perpetuity with some half a million dollars per year in costs. The lower court, however, sidestepped appellant's argument that it was being subjected to an unprecedented affirmative burden simply by noting that it would "nullify" the Commonwealth's environmental policy if Barnes & Tucker could "avert responsibility for abating a nuisance which it created under the proposition that it may abandon its enterprise, rather than operate such enterprise within the parameters of the environmental regulations. . . ." (**Barnes & Tucker (II),** 371 A. 2d at 467; A127-A128).

While a state regulation need not permit businessmen to charge forward the known costs of regulation and then simply to walk away from the business when these accounts fell due, plainly a different rule is required where all the activity which gave rise to the present condition is totally lawful "past conduct which obviously cannot now be abated," (**Barnes & Tucker (I),** 455 Pa. at 419, 319 A. 2d at 885; A96), and where there is a total absence of "facts

supporting concepts of negligence, foreseeability or unlawful conduct." (*Id.* at 414, 319 A. 2d at 883; A91).

Finally, **Usery v. Turner Elkhorn Mining Co.,** 428 U. S. 1 (1976), cited in passing by the court below, does not serve to bridge the constitutional gap. The statute compensating victims of "black lung" disease upheld in **Turner Elkhorn** did involve a retrospective element insofar as it imposed upon mine operators liability for harm suffered by miners who had left employment in the industry before the effective date of the Act. However, unlike the instant case, liability was limited in **Turner Elkhorn** to present mine operators, and merely was extended to include certain specific claims of past employees. Significantly, the measure was upheld on the theory that this was a rational means of spreading the costs of past mine working conditions to those who had profited thereby—both the coal consumers and the industry. 428 U. S. at 18.

While the scope of the statutory scheme upheld in **Turner Elkhorn** is clearly distinguishable from that imposed upon appellant in that it was imposed only upon the working industry where it could be passed on in the price of present production, **Turner Elkhorn** is nonetheless instructive insofar as it sheds light on the magnitude of affirmative regulation which will stand up under the more stringent due process test applicable to retrospective legislation.

Obviously, the burden imposed upon operators under the Black Lung Benefits Act is insubstantial as compared to that involved here. By providing that the federal government rather than individual operators would be liable upon claims filed during an initial three year period, and by requiring that claims were to be filed within three years of discovery, not only did the legislature relieve the operators almost entirely of liability for claims maturing before enactment of their responsibilities, see 428 U. S. at

16, n. 14 and associated text, the Act also evidenced its intent that the federal government would assume responsibility for "those cases which form the backlog of claims—both those which have been denied previously and those which are newly covered under the amendments to the law. . . ." S. Rep. No. 92-743, 92d Cong., 2d Sess., reprinted in [1972] U. S. Code Cong. and Ad. News, 2305, 2324.[11]

Moreover, since the breakout of mine drainage in this case occurred from a portion of Mine No. 15 which had been mined before appellant had any interest in it, there is no conceivable constitutional justification for imposing pumping and treatment costs upon appellant. At the time appellant began operation of Mine No. 15, there was no way in which it could have anticipated that some twenty-five years later the state would make it liable for post-mining discharges and could, therefore, have avoided operating the mine or have attempted to make financial provision for future pumping and treatment costs.[12] Equally clearly, there was no way that appellant could have operated Mine No. 15 to prevent the breakout since

11. In any event, **Turner Elkhorn** involved only a "facial attack" upon the validity of the statute as a whole and not its application to a particular class of operators or factual circumstances. (See the decision of the district court reported as **Turner Elkhorn Mining Co. v. Brennan,** 385 F. Supp. 424, 426 (E. D. Ky. 1974).) Thus, the Court's decision in **Turner Elkhorn** would not preclude future challenges under the Black Lung Benefits Act of the kind involved here, *i.e.*, that even a statute or regulation which is not unconstitutional on every application may still be unconstitutional in its application to a particular class of mine operators. *See,* 428 U. S. 45, n. 9 (Powell, J., concurring).

12. Compare the Black Lung Benefits Act, 30 U. S. C. § 932 (c)(i), wherein the sole exception to the limitation of operators' liability for benefits for injuries arising, at least in part, from employment in a mine during the period he operated it is with respect to a new operator who, *after the effective date of the act, assumes liability* for benefits for which a prior operator would have been liable but for the transfer of the mine.

the mining near the surface, where the breakout occurred, had already been done. In other words, liability has been imposed on appellant without notice and with respect to a condition it could not prevent.

Thus, the Supreme Court of Pennsylvania in this case has proclaimed a doctrine which is unique to American constitutional jurisprudence in upholding a statute which makes appellant—and those similarly situated—liable for perpetual pumping and treatment of water from its abandoned mine even though it had no notice that it might have this liability at the time it conducted its mining operations, it conducted these operations and sealed the mine in accordance with the law without negligence or other fault, and it could not have foreseen that any deleterious post-mining discharge was likely to have occurred.

2. Even Assuming That the Court Below Correctly Held That Appellant Might Be Liable Without Fault or Foreseeability for Post-Mining Treatment of Water Generated in Its Own Former Mine, Certainly the Due Process and Equal Protection Clauses Prohibited That Court From Upholding Legislation Which Imposed Similar Liability With Respect to the Five-sixths of the Drainage Involved in This Case Which Flows Into Appellant's Former Mine From Neighboring Abandoned and Active Mines.

In its original appellate decision, the court below remanded the case to the trial court for a determination of whether the imposition upon appellant of a perpetual duty to pump and treat drainage from Mine No. 15 would constitute an unconstitutional taking. In so doing, the court stated:

> "The possibility of sealing and isolating Mine No. 15 so as to prevent future discharges may exist, but the feasibility of such relief was not directly ad-

dressed below. Much of the testimony below was concerning the mines adjacent to Mine No. 15, the barriers and cut throughs between them, the quantity and quality of water generated in each of the mines, the amount of fugitive water migrating into Mine No. 15, and whether, but for the fugitive waters, any discharge would occur at Mine No. 15. We believe a finding in regard to the sources of water being discharged from Mine No. 15 would be relevant in a determination of the appropriate relief. In this regard we note a key distinction from the situations present in Commonwealth v. Harmar Coal Co. and Commonwealth v. Pittsburgh Coal Co., 452 Pa. 77, 306 A. 2d 308 (1973). Those cases involved the pumping of water from abandoned mines in connection with the operation of working mines. In the present case we are essentially dealing with a natural discharge (but for the pumping at Duman Dam) from an abandoned mine which may include acid mine drainage which originated in adjacent abandoned mines." 455 Pa. at 419-20 n. 16, 319 A. 2d at 886 n. 16; A97 n. 16.

The trial court, in response to this direction, found not only that there was no feasible way to seal Mine No. 15, but that fully five-sixths of the water which must be pumped from that mine to prevent a future breakout and be treated was not generated in Mine No. 15 but flowed into that mine from other active and abandoned mines. 23 Pa. Commw. Ct. at 508, 353 A. 2d at 478; A109. The court below held that the record supported this finding. 371 A 2d at 465; A124-A125. Nevertheless, citing **Commonwealth v. Harmar Coal Co.,** 452 Pa. 77, 306 A. 2d 871 (1973), *appeal dismissed,* 415 U. S. 903 (1974), which held an active mine operator responsible for polluted drainage *it pumped* from an abandoned mine for the protection of its

operating mine, the court below affirmed the imposition of liability for treating the entire discharge on appellant on the ground that "it is not the source of the polluted water itself but the *source of the discharge* of the acid mine water into the waters of the Commonwealth with which we are presently concerned." 371 A. 2d at 466; A126-A127.

The extreme inequity of the result in this case is emphasized by the fact that, at the very time that Barnes & Tucker was forced to abandon Mine No. 15 because it could not be economically operated in accordance with the dramatic new requirements of the 1965 Amendments, the owners of the adjacent active Colver Mine decided to *decrease* their pumping and to permit the unpumped and untreated water to accumulate in the lower portion of the mine abutting Mine No. 15, where the combination of the natural geology and the existence of cut throughs, pillaring and breached barriers between the mines in the complex made it inevitable that a substantial portion of this drainage would ultimately migrate to Mine No. 15 (23 Pa. Commw. Ct. at 504-08, 353 A. 2d at 476-77; A108-A109). Accordingly, the result of the statutes upheld in this case is to impose upon petitioner, not merely the unanticipated costs of treating the discharge from Mine No. 15, but, in addition, costs properly attributable to a still active mining operation which continues thereby to avoid its share of those very same environmental costs which had previously forced appellant to abandon its operations.[13]

13. The final wrong of the imposition upon appellant of the cost of treating the drainage from the whole series of higher mines in the Barnesboro basin is that but for the decision of the court below refusing to allocate responsibility to the mines that generate the subsurface water, Pennsylvania would be responsible for treating the water generated in the Moss Creek and Sterling mine complexes since those mines were closed before January 1, 1966 and, accordingly, come within the state-funded clean-up provisions of the **Act of December 15, 1965,** P. L. 1075, 35 P. S. § 760.1 et seq.

Neither the Equal Protection Clause nor the Due Process Clause permits Pennsylvania to single out appellant from among the past and present mine operators in the Barnesboro basin and to impose upon it, merely because of a fortuity in geology, the burden of pumping and treating the mine drainage generated in all of the mines in that basin. If liability for treatment may be imposed without fault, it should certainly be apportioned among all of the former operators of abandoned mines. More important, the drainage from an active mine should certainly not have to be treated by the former operator of an abandoned mine to the benefit of the operator of the active mine.

This is not to suggest that mine drainage is not an important problem subject to solution under the police power. To the degree that appellant or any other mine operator pumps mine drainage in connection with its operations, it may be compelled to treat that drainage. To the degree that any operator operates a mine after notice that continued operation will entail a duty to treat post-mining drainage, that duty may be imposed upon that operator. But the desirability of finding an easy solution to the treatment of acid mine drainage does not justify the imposition upon a former mine operator of the duty to treat mine drainage which results primarily from the mining activity of others. When neither fault nor operation after notice that a burden of that operation is the treatment of post-mining drainage supports the imposition of those treatment costs on a mine operator, it is the state and not the operator who must pay the treatment costs.

The fact is that neither the public nor mine operators have, until recently, became aware of the possibility that the environment may be protected against various pollutants or the necessity of doing so. The desire to achieve

that protection has become a matter of great public concern with the common consequence that governments have felt compelled to do "whatever is necessary" to remedy what they view as an acceptable situation.

However, even the existence of a very pressing public need will not justify constitutional "shortcuts" which bypass individual rights. Nor does the fact that we can now identify the harm, which had previously been merely a hidden cost of other presumably great public needs, justify imposing upon a faultless person the burden of our collective ecological ignorance and lack of foresight. *Cf.*, **Berger, "A Policy Analysis of the Taking Problem"**, 49 N. Y. U. L. Rev. 165 (1974).

Unless this Court is now prepared to hold, as in effect the Pennsylvania Supreme Court did, that there is no longer any degree of private burden which cannot be justified in the name of the public welfare, it must find that the Commonwealth of Pennsylvania has departed the constitutional path in this case.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the Court should note probable jurisdiction to review and reverse the judgment from which this appeal is taken.

Respectfully submitted,

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Dated: July 5, 1977.

IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-54

BARNES & TUCKER COMPANY,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

APPENDIX TO JURISDICTIONAL STATEMENT.

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INDEX TO APPENDIX.

Appendix.

COMMONWEALTH OF PENNSYLVANIA

v.

BARNES & TUCKER COMPANY.

Hearings and arguments March and April, 1971, before President Judge BOWMAN, sitting as Chancellor in Equity.

Complaint in Equity filed in the Court of Common Pleas of Dauphin County No. 3067 Equity Docket: No. 333 C. D. 1970 in case of The Commonwealth of Pennsylvania v. Barnes & Tucker Company. Case transferred September 1, 1970, to the Commonwealth Court of Pennsylvania, 896A Tr. Dkt. 1970.

Stanley R. Wolfe, Special Assistant Attorney General, with him *Philip T. Warman,* Special Assistant Attorney General, and *J. Shane Creamer,* Attorney General, for plaintiff.

Cloyd R. Mellott, with him *C. Arthur Wilson, Jr.,* and *Eckert, Seamans, Cherin & Mellott,* and *Frank A. Sinon, Rhoads, Sinon & Reader,* for defendant.

OPINION AND ORDER BY PRESIDENT JUDGE BOWMAN, April 13, 1971:

In this highly technical and controversial case with little legal precedent for the numerous and complex legal issues raised, the sole issue before us at the present time is whether a mandatory preliminary injunction should issue directing the Barnes & Tucker Company to operate what is known as the Duman Dam Treatment Facility pending determination of the case upon its merits.

In late June 1970, there was discovered a substantial discharge of acid mine water into the West Branch of the Susquehanna River from the "Buckwheat" borehole of Lancashire Mine No. 15. The No. 15 mining complex extends from its northeast perimeter on the West Branch of the Susquehanna River to its southwest perimeter at the headwaters of the Allegheny River watershed where the Duman Dam facility is located.

On July 23, 1970, another substantial discharge from No. 15 through the earth's surface into the West Branch in the vicinity and south of the Buckwheat borehole was discovered. This discharge point has become known as the breakout area.

These events precipitated a series of administrative actions by the then Sanitary Water Board with respect to certain outstanding mine drainage permits theretofore issued by the Board to Barnes & Tucker. These permits, and others previously issued, have bearing upon the rights and duties of both Barnes & Tucker and the Commonwealth under the statutory law then in effect and that are presently in force. At this juncture, we shall not further detail or discuss these permits. Suffice it to say here that Barnes & Tucker had constructed at Duman Dam a pumping facility pursuant to one of the permits and briefly operated it prior to cessation of mining activity in No. 15.

The above-mentioned administrative actions by the Sanitary Water Board produced an appeal to this Court by Barnes & Tucker. In the meantime, the Commonwealth had undertaken to treat the discharge into the West Branch from No. 15 by a liming process. This treatment to a large degree prevented *further marked pollution* of the West Branch downstream from the Curwensville Dam and produced a varying but generally favorable level of

alkalinity of water in the area of the Curwensville Dam and immediately upstream therefrom; but, by reason of the treatment, large quantities of sludge were precipitated along the banks and on the bottom of the West Branch immediately downstream from the discharge. In a river which theretofore had substantial acid mine drainage pollution (and which continues to be polluted by acid mine drainage from sources other than No. 15), the Commonwealth, upon discovering the discharge from No. 15, was confronted with the practical problem of how best to cope with this *additional pollution* of the Susquehanna River and particularly its West Branch.

We need not and do not pass upon the action taken by the Commonwealth in dealing with the problem. It undertook to treat the discharge by a liming process and, on August 7, 1970, initiated this action in equity against Barnes & Tucker. The original complaint sought, preliminarily and permanently, injunctive relief restraining Barnes & Tucker from operating No. 15 [1] or directing that its mine drainage discharge be treated to meet specified water quality standards.[2]

Hearing on plaintiff's application for a preliminary injunction was fixed by the Court for August 26, 1970. However, on that day there was presented to the Court a rather unusual stipulation by the parties. It provided that the Commonwealth would continue its liming treatment of the discharge from No. 15 into the West Branch until Barnes & Tucker, in accordance with specifications contained in the stipulation, constructed and commenced operation of the Duman pumping and treatment facility

1. At that time Barnes & Tucker had in fact ceased mining operations in No. 15.

2. An amended complaint has since been filed which includes a request for additional relief allegedly consistent with a stipulation of the parties hereafter discussed.

at the southwest end of the mine with the expected result that the pumping operation at Duman would terminate discharge from the Buckwheat borehole and breakout area. Other provisions of the stipulation dealt with the costs of operating the two facilities and for ultimate responsibility of payment of costs incurred.

Germane to the present posture of this case and to the assumption by the Commonwealth of the operation of the Duman facility are additional provisions in the stipulation allowing Barnes & Tucker to terminate operation to the Duman facility [3] and for resumption of administrative adjudication procedures as to some of the issues here raised.

The Court accepted the stipulation, made it a part of the record but was not asked to and did not issue a preliminary injunction embodying the stipulation. Hearing on the preliminary injunction was indefinitely continued awaiting the outcome of administrative procedures which the parties had stipulated would be undertaken.

From August 26, 1970 until the Commonwealth renewed its application for preliminary injunction in early March of this year, further pollution of the West Branch has been effectively stayed and the source tributaries of the Allegheny River have been spared substantial further pollution by reason of the operation of the Duman treatment facility, first by Barnes & Tucker and now by the Commonwealth. However, the original cooperation and concern by the parties, as demonstrated by the stipulation, has been displaced by disagreement and bickering, and progress towards an administrative adjudication of at least some of the issues now before us has been nonexistent due in part to the demise of the Sanitary Water Board upon

3. After a minimum of thirty days of operation and with notice to the Commonwealth of its intent to so terminate, in fact Barnes & Tucker ceased operating the Duman facility after 114 days.

the creation of the Department of Environmental Resources in January 1971.

The decision of Barnes & Tucker to terminate its responsibility for operating the Duman treatment facility—a right afforded to it under the stipulation—and the assumption of its operation by the Commonwealth prompted the Commonwealth to renew its application injunction.

After eight days of hearings on preliminary injunction during which many witnesses, including experts, testified, and at which approximately 200 exhibits were introduced, only two things have emerged as being entirely clear; (1) that the underlying legal issues, including constitutional questions, present complex and novel questions with very little precedent in Pennsylvania jurisprudence, and (2) that a cessation of operation of the Duman pumping and treatment facility cannot be permitted to occur regardless of existing pollution of the waters of the Susquehanna River and the headwaters of the Allegheny River from sources other than discharge from No. 15. In essence, we conclude from the evidence that irreparable harm *would occur* if acid mine drainage from No. 15 is allowed to enter the waters of the Commonwealth without first being treated.

Defendant correctly contends that so long as the Commonwealth continues to operate the Duman facility irreparable harm is not occurring and is not likely to occur. From this it would have us conclude that the Commonwealth has failed to prove existing irreparable harm, a necessary ingredient to the issuance of a preliminary injunction. However, the Commonwealth is a volunteer in the operation of the facility and is under no legal duty to do so or continue to do so, just as Barnes & Tucker was under no legal duty (other than by stipulation of the parties) to operate the facility for the period it did pending a judicial determination of the issues before us.

Having concluded that irreparable harm would occur upon cessation of the operation of the facility, we cannot close our eyes to the potential irreparable harm if the Commonwealth as a volunteer decides as a policy matter to cease operation of the facility.

Thus, we further conclude, under the circumstances here presented, that irreparable harm although not presently existing is so close to reality, with calamitous results if it becomes a reality, that a court in the exercise of its equitable powers should consider threatened or potential irreparable harm as the equivalent of existing irreparable harm. *Commonwealth of Pennsylvania v. State of West Virginia*, 43 S. Ct. 658, 262 U. S. 553, affirmed on rehearing, 44 S. Ct. 123, 263 U. S. 350 (1923).

Another essential ingredient to the issuance of a preliminary injunction, particularly one requiring something to be done, is that it should be granted only where the right is clear. *McDonald v. Noga*, 393 Pa. 309, 141 A. 2d 842 (1958); *Schwab v. Pottstown Borough*, 407 Pa. 531, 180 A. 2d 921 (1962).

We have already observed that the basic legal issues in this case are complex and with little precedent in our body of law. The right of the Commonwealth to the relief it ultimately seeks is not clear at this point in the case. Does this announced principle—as defendant contends—preclude the issuance of a preliminary injunction? We think not. While the power of a court of equity to issue preliminary injunctions should be withheld where the likelihood of plaintiff's eventual success may be remote—which necessarily requires some preliminary probing by the Court into the underlying legal issues—the clarity of right as declared in our decisional law deals with the right to the preliminary relief sought, not the ultimate relief sought. It would indeed be a rare case in which

plaintiff's right to the ultimate relief sought is so clear prior to trial.

A review of many decisions in which there is announced the principle that a plaintiff's right to preliminary injunction should be clear convinces us that its very generality affords little guidance for its application in other cases, particularly in those cases, as in this one, where the public interest is so compelling. It would appear that this pronouncement is little more than an expression of caution that courts should exercise this equitable power with restraint.

Treating it as such, we view this case, based upon the evidence before us, as one (a) in which it has been demonstrated that irreparable harm will result if the Duman facility is not continued in operation, (b) in which the resulting harm to the public at large could not readily be corrected, and (c) in which the harm could not be measured in dollars nor compensated for in damages after the fact.

In the public interest, we are therefore constrained to take such steps as may be necessary to assure continued operation of the Duman facility pending final disposition of this litigation. In exercise of our power and discretion we shall also assign financial responsibility for such operation pending the outcome of this litigation. While this step may be both novel and unprecedented we believe it both reasonable and proper to do so incident to litigation arising out of new concepts and untested law in the environmental field. In doing so we would note that our action is not a marked departure from that which the parties, in their stipulation before the Court, considered as an acceptable temporary solution to the problem posed by the acid mine drainage discharge from No. 15.

Accordingly, we enter the following

ORDER

Now, April 13, 1971, it is hereby decreed and ordered as follows:

1. Effective April 26, 1971, Barnes & Tucker Company shall assume exclusive responsibility for and undertake the operation of the Duman Dam pumping and treatment facility and (a) maintain a level of pumping necessary to avoid acid mine drainage discharge from Lancashire No. 15 from the Buckwheat borehole in the breakout area into the West Branch of the Susquehanna River, (b) maintain a treatment program of the discharge from Duman Dam to achieve at least equal water quality levels heretofore achieved in the operation of said treatment facility.

2. In operating the Duman Dam pumping and treatment facility Barnes & Tucker Company shall keep and maintain correct and adequate records separate from its regular books of account, of the actual cost of operating the Duman facility and the amount of capital expenditures deemed necessary to maintain the facility. Capital expenditures in excess of $200.00 shall, except in an emergency, have the prior approval of the Court.

3. Within five (5) days after the end of each thirty-day period of operation, Barnes & Tucker Company shall submit to the Department of Environmental Resources of the Commonwealth and to the Court a statement of cost of operation and of capital expenditures made during each thirty-day period; and within ten (10) days thereafter, the Commonwealth shall pay to Barnes & Tucker Company one-half of the statement submitted. Failure of the Commonwealth to make payment as herein provided within the prescribed time shall work an automatic dissolution of this order from the date of such failure and

Barnes & Tucker Company henceforth shall be under no duty or obligation by reason of this order to continue operation and maintenance of the Duman facility.

4. The expenditures made or paid by each of the parties under this order shall follow the final judgment in the case and be recovered by the successful party.

5. This order shall continue in effect, except as otherwise hereinbefore provided, until final determination of the case upon its merits or until further order of the court.

6. This order is not intended to nor shall it be construed to alter or change the rights and responsibilities of the parties under their Stipulation and Supplemental Stipulation of August 26, 1970 with respect to the construction and operation of the Duman Dam pumping and treatment facility prior to April 26, 1971 nor to other provisions of said Stipulation and Supplemental Stipulation outside the scope of this order.

COMMONWEALTH

v.

BARNES & TUCKER COMPANY.

—

Argued January 6, 1972, before President Judge BOWMAN and Judges CRUMLISH, JR., KRAMER, WILKINSON, JR., MENCER, ROGERS and BLATT.

Original jurisdiction, No. 896-A Tr. Dkt. 1970.

Stanley R. Wolfe, Special Assistant Attorney General, with him *Richard B. Springer,* Assistant Attorney General and *K. W. James Rochow,* Assistant Attorney General, for plaintiff.

Cloyd R. Mellott, with him *C. Arthur Wilson, Jr., Richard C. Seamans, John R. Kenrick, Frank A. Sinon, Eckert, Seamans, Cherin & Mellott* and *Rhoads, Sinon & Reader,* for defendant.

OPINION BY PRESIDENT JUDGE BOWMAN, April 16, 1973:

By complaint in equity the Commonwealth seeks a mandatory injunction requiring Barnes & Tucker Company (B & T), a Pennsylvania corporation, to treat acid mine drainage discharging from Lancashire Mine No. 15 so long as such discharge does not meet minimum water quality standards, and which substandard quality of the discharge is expected to continue for the foreseeable future. B & T, the last operator of Mine 15, denies any legal responsibility for the discharge or its treatment under any one or more of the legal theories advanced by the Commonwealth in support of the relief sought.

Twelve days of hearings have produced a record of over 1400 pages of testimony and more than 250 exhibits, which record in turn has produced almost 200 requests for findings of fact and conclusions of law by the Commonwealth and over 300 on the part of B & T.

By agreement of counsel and leave of court the case has been argued on the facts and the law before the court en banc and assigned to the Chancellor for adjudication.

In narrative form we shall set forth the history, background and events out of which this litigation arose and which is deemed essential to the legal issues raised. This narrative will encompass the majority of undisputed and common facts requested to be found by both parties. Facts essential to the legal issues which are in serious dispute as between the parties on grounds of relevancy, or of materiality or which are the subject of conflicting evidence will be specifically treated.*

Location and History of Mine No. 15

Mine No. 15, a bituminous deep coal mine, is located in the "B" or Lower Kittanning seam of coal in an area of Cambria County and Indiana County, Pennsylvania, known as the Barnesboro Basin. The Barnesboro Basin is an area bounded on the east by the Laurel Hill Anticline, on the west by the Nolo Anticline, on the south by unmined coal, and on the north by the West Branch of the Susquehanna River. The Laurel Hill Anticline and the Nolo Anticline represent the highest points of the Basin in terms of elevation. The lowest portion of the Basin which lies between those two anticlines is known as the Barnesboro Syncline. At the southerly end of the Basin, the Barnesboro Syncline is in unmined coal. From that point, it progresses eastwardly to a mined area in a mine

* Rulings reserved during the trial on objections to evidence are set forth in an appendix attached hereto and incorporated herein by reference thereto, as are requests for findings of fact and conclusions of law made by the parties but not adopted by the Chancellor.

known as the Colver Mine and then northwardly into Mine No. 15. It then progresses through the length of Mine No. 15 into a mine known as Springfield No. 4 and then out the northern end of the Basin. Most of the area of Mine No. 15 is located in the Barnesboro Syncline and is located in the lowest portion of the Barnesboro Basin. It contains approximately 6,600 acres.

The driftmouth of Mine No. 15 is located near Bakerton on the West Branch of the Susquehanna River at an elevation of approximately 1,531 feet. A drift opening in a mine is an opening which is made at a point where the coal seam in which the mine is located outcrops at or near the surface of the ground.

From the point where the driftmouth of Mine No. 15 is located at the outcrop of the "B" seam of coal near the West Branch of the Susquehanna River, the "B" seam of coal slopes downward in a southwesterly direction.

The earliest mining in Mine No. 15 was in the year 1915 and was done in the northeasterly section of the mine at or near where the "B" seam of coal outcrops near the West Branch of the Susquehanna River. From that point, the mining in Mine No. 15 was done to the dip, that is, from the highest point of elevation in the mine at the outcrop down the slope of the "B" seam in a southwesterly direction to the lowest area of the mine which is at an elevation of approximately 1,230 feet.

Mine No. 15 was first operated by the Watkins Coal Co. under the name "Watkins No. 3." In 1916, the operation of the mine was taken over by the Watkins Coal Mining Co., and the mine was operated by that company under the name "Watkins No. 3" through the year 1922. In the year 1923, the operation of the mine was taken over by the Pennsylvania Coal and Coke Corp., which operated the mine under the name "Pennsylvania No. 18."

The mine was idle during the years 1924 and 1925. In 1926, the mine began to be operated by the Barnes Coal Co., which continued to operate the mine through the year 1938. In 1939, B & T acquired the assets of Barnes Coal Co. and took over the operation of Mine No. 15.

During the entire period of its operation, the total amount of coal produced from Mine No. 15 was 29,010,131 tons. Of that total production, 25,388,414 tons were produced prior to January 1, 1966, and 3,621,717 tons were produced after January 1, 1966. The annual production of coal from the mine beginning with the year 1960 is as follows:

Year	*Annual Tons of Production*
1960	824,923
1961	861,051
1962	1,164,885
1963	1,581,043
1964	1,697,283
1965	1,747,435
1966	1,464,946
1967	1,056,759
1968	886,726
1969	213,286

The portion of Mine No. 15 known as the breakout area is located on the West Branch of the Susquehanna River at a point where the "B" seam of coal is within approximately fifty feet of the surface of the land.

During the final four years of operation of Mine No. 15 (1966-1969) 3,621,717 tons of coal were mined having a net sale value at $18,198,631 and resulting in a pretax profit of $2,777,608.

Less than 10% of the total area of Mine No. 15 was mined after January 1, 1966 and the area mined after that date was in the southwesterly part of the mine and was at an elevation 100 feet to 215 feet lower than the coal elevation at the breakout area, with the majority of such mining having at least 150 feet to 200 feet below the coal elevation at the breakout area. Less than 40% of the area of Mine No. 15 that was mined after January 1, 1966 was mined after October 1, 1967.

If the area of Mine No. 15 mined after January 1, 1966 had not been so mined, the breakout of mine water which occurred in the summer of 1970 along the West Branch of the Susquehanna River near its driftmouth would still have occurred.

Coal was last removed from Mine No. 15 on May 10, 1969. Sealing procedures and removal of equipment were completed at later dates.

On May 10, 1969, there was still mineable coal in certain areas of Mine No. 15, but B & T ceased operation of the mine for the reason that it could not economically afford to pump and treat the water that it would have had to pump from the mine to continue to operate the mine.

There is no intention on the part of B & T to reopen Mine No. 15 or to resume the operation of that mine.

After May 10, 1969, B & T proceeded to complete the construction of bulkhead seals between Mine No. 15 and Mine No. 24-B and to seal the other openings in Mine No. 15.

The construction of the bulkheads between Mine No. 24-B and Mine No. 15 and the sealing of Mine No. 15 by B & T were done in accordance with the requirements of the Department of Mines and Mineral Industries of the Commonwealth in effect at the time the construction and

sealing were done. Concrete seals were not used as provided for by special condition of a permit hereinafter referred to.

The driftmouth of Mine No. 15 was sealed with a type of seal known as an air seal which comported with requirements of the Department of Mines and Mineral Industries. An air seal is a seal which will allow water to flow out of a mine but at the same time will prevent the entry of air through the seal into the mine.

Until January, 1971, the agency of the Commonwealth responsible for the regulation and control of the sealing of coal mines was the Department of Mines and Mineral Industries. Since then, the responsibility has been vested in the Department of Environmental Resources.

Some time prior to September 24, 1969, B & T filed a closing or abandoned mine map of Mine No. 15 with the Department of Mines and Mineral Industries in Harrisburg. On this map, the notation appears–"Abandoned May 10, 1969." That notation was written on that map by Everett Pennington, then an employee of the Department of Mines and Mineral Industries whose responsibilities included receiving and filing "abandoned" bituminous mine maps.

The Certificate and Permit History of Mine No. 15

Prior to the Act of May 8, 1945, P. L. 435, amending the so-called Pure Streams Act of June 22, 1937, P. L. 1987, 35 P. S. § 691.1 et seq., the statutory law of Pennsylvania did not require the operator of a coal mine to obtain a certificate or permit with respect to the discharge of mine waters into the streams of the Commonwealth.

After the 1945 Act became effective and implemented, a "Certificate of Approval of Mine Drainage" was issued by the Sanitary Water Board to B & T for Mine No. 15, which certificate was dated July 22, 1948 and bore the number 892. By this certificate the Board approved a plan of mine drainage and disposal whereby discharge from the mine would be pumped at three pumping stations and discharged into the West Branch of the Susquehanna River without any requirement of treatment or provision for post-mining discharge. It did, however, contain the following condition:

"When in the opinion of the Board, because of changes in the volume or character of the drainage or the time or manner of disposing of it, or the changed use or condition of the receiving stream, the herein approved disposal of mine drainage ceases to be satisfactory to the Board, then upon notice by the Board, the right herein granted to discharge such drainage shall cease and become null and void and, within the time specified by the Board, the Owner, Operator or Lessee shall adopt such remedial measures as, in the opinion of the Board, will be satisfactory."

Based upon an application of B & T dated January 5, 1960, on March 25, 1960, a new permit for mine drainage and industrial waste disposal was issued by the Board for Mine No. 15. Under this permit, bearing the number 14326 (sometimes referred to as 19124-M, apparently because the application was assigned that number), the Board approved a change of plan of mine drainage for Mine No. 15 whereby the drainage would be pumped from the mine at the Duman pumping station located at the southwest end of the mine at its lowest elevation point and discharged into Crooked Run, a tributary of Elk Creek, which flowed to the North Branch of Black Lick

Creek and then to the Conemaugh River, being headwaters of the Allegheny River. There was no requirement in this permit for the treatment of the mine drainage nor any provision for post-mining discharge. This permit superseded Certificate No. 892.

On September 15, 1961, B & T filed an application for a new mine drainage permit for Mine No. 15 and for two new coal mines which were being opened by it, one of which was Lancashire Mine No. 24-B in the "B" seam of coal; and the second of which was Lancashire Mine No. 24-D in the "D", or Lower Freeport, seam of coal. The proposed plan of drainage for Mine No. 15 was the same as that which had previously been covered by Permit No. 14326, that is, to pump the water from the mine at the Duman pumping station. In addition, B & T proposed to drain water from Mine Nos. 24-B and 24-D into Mine No. 15 for pumping and discharge at the Duman pumping station.

As disclosed by the application, substantial drainage from this complex of mines was anticipated to be 6.5 million gallons per day and water quality varied from an expected alkaline state as to drainage from Mine No. 24-D to that of high acid and iron content in the other areas of the mining complex.

On December 21, 1964, a new permit bearing No. 564M5 (also sometimes referred to as 564M005) was issued by the Board to B & T approving the plan of proposed mine drainage as submitted. There was no requirement in this permit that the drainage be treated nor was there any provision for post-mining discharge or the treatment thereof. This permit superseded permit No. 14326. However, under legislation then in effect (1945 amendments) treatment of the discharge would have been required had the streams into which the discharge was to flow not been "unclean" streams.

We here note parenthetically that the actions of the parties as to permit No. 564M5 before and after the effective date of the 1965 amendments to The Clean Streams Law [1] and the issuance of a new permit to B & T under the new legislation (permit No. 567M035, *infra*) are matters of great dispute and controversy as between the parties and directly bear upon the statutory law to be considered as governing this case.

The certificate and permit history continues by specific findings of fact.

1. On May 25, 1966, pursuant to Section 315(d) of the 1965 amendments to The Clean Streams Law, B & T, on a form furnished by the Commonwealth, applied for an extension of time to operate under its mine drainage permit No. 564M5 which, as then in effect, covered Mines Nos. 15, 24-B and 24-D. As previously noted, while substantial drainage from the mining complex was anticipated and provided for by a pumping facility at Duman Dam, and the quality of drainage was generally of high acid and iron content, no requirement for treatment of the drainage had been imposed nor provision made for post-mining discharge.

2. Representations made in the body of the May 25, 1966 application and an attached "Summary Report" recognized continued high volume of discharge from the mining complex and its high acid and iron content. It

1. Act of August 23, 1965, P. L. 372, effective January 1, 1966, discussed *infra*, which radically altered the existing law on the subject of mine drainage discharges into the waters of the Commonwealth. Section 315(d) provided that previously issued mine drainage permits "shall be deemed to be a permit issued pursuant to this section . . . [and] shall be valid for one year . . . or for such additional periods as the board might allow." The amendment also gave the legislation the short title of "The Clean Streams Law."

was further represented that the discharge was to be treated and there were set forth two alternative plans for treatment and a time schedule for completion of treatment facilities.

3. By letter dated November 2, 1966, the Board granted an extension of permit No. 564M5 to November 1, 1968, ". . . to complete mining operations covered by your Permit . . . subject to the following stipulations:

"1. That you abide by Conditions numbered 3, 4, 6, 7 & 27 of the 'Standard Conditions Accompanying Permits Authorizing The Operation of Coal Mines' as adopted by the Sanitary Water Board on January 19, 1966, which shall be attached to and made a part of your Permit No. 564-M005.

"2. That you report to the Regional Sanitary Engineer giving the status of your abatement project, at the times set forth in Item 18 of your Application for an Extension of Time."

4. On November 8, 1966, B & T formally accepted and agreed ". . . to abide by the special added conditions incorporated into and made a part of . . ." permit No. 564M5.

5. The special conditions of possible relevancy referred to are:

"THREE: No silt, coal mine solids, rock, debris, dirt and clay shall be washed, conveyed or otherwise deposited into the waters of the Commonwealth.

"SIX: The permittee shall notify the reporting agency by certified mail that he has completed operations within fifteen (15) days after mining is completed.

"SEVEN: Whenever, because of an accident or otherwise, a discharge not allowed by the permit occurs, the

permittee shall immediately telephone the reporting agency to report such incident and shall promptly take such steps as are necessary to halt the unauthorized discharge."

6. On the form supplied by the Commonwealth for an extension of time for a *pre*-1965 amendment permit is an item (No. 18) for a schedule of completion of certain steps including "Final Plans and Application" to which B & T responded by indicating the date of March, 1967.

7. By letter dated March 13, 1967, B & T acknowledged its responsibility under the time extension granted with respect to permit No. 564M005 to ". . . submit final plans and application for new mine drainage permit . . . during March 1967" but because of needed additional pilot plan studies, further time was needed to September, 1967.

8. On or about October 17, 1967, B & T filed an application for a mine drainage permit on a form prescribed for *post*-1965 amendment permits which application pertained to both Mines Nos. 15 and 24. On March 22, 1968, permit No. 567M035 was issued in response to this application subject to terms and conditions hereinafter set forth.

9. As part of its application resulting in issuance of permit No. 567M035 there was attached an engineering report to which was later added an addendum estimating the volume of drainage from both mines. It was also disclosed for the first time that the closing of Mine No. 15 was contemplated and it estimated a substantially reduced drainage after construction of bulkheads and the inundation of Mine No. 15 upon cessation of mining in that mine. The report, however, represented

the contemplated construction of a treatment system for mine drainage to meet minimum water quality standards and related subjects of pumping capacity, storage basins, methods of treatment and sludge removal and disposal.

10. Permit No. 467M035, as issued, was subjected to certain designated standard conditions and contained the specific proviso that B & T comply with ". . . all representations regarding operation, construction, maintenance and closing procedures as well as all other matters set forth in [its] application and its supporting documents." Pertinent standard conditions incorporated into the permit were:

"(6) 'The permittee shall notify the reporting agency [Department of Health] by certified mail that he has completed operations within fifteen (15) days after mining is completed.'

"(7) 'Whenever, because of an accident or otherwise, a discharge not allowed by the permit occurs, the permittee shall immediately telephone the reporting agency to report such incident and shall promptly take such steps as are necessary to halt the unauthorized discharge.'

"(8) 'The permittee shall fully comply with the mine closure procedures set forth in the plan for drainage in an expeditious manner after mining has been completed.'

"(10) 'The permittee shall at no time discharge to the waters of the Commonwealth mine drainage from any source the pH of which is less than 6.0, or greater than 9.0'

"(11) 'The permittee shall at no time discharge to the waters of the Commonwealth mine drainage from any source containing a concentration of iron in excess of 7 milligrams per liter.'

"(12) 'The permittee at no time shall discharge to the waters of the Commonwealth mine drainage from any source the acid content, of which . . . exceeds its alkaline content. . . .'

"(27) 'Monthly operation reports shall be submitted to the Board through the reporting agency on forms supplied by the agency. Such reports shall be submitted promptly after the end of each month.'"

11. On May 6, 1968 (approximately six weeks after issuance of permit No. 567M035), B & T by letter to the Department sought a further extension of time to operate under permit No. 564M5 from November 1968 (the expiration date of the first extension granted to that permit) to April 1969. In this letter B & T represented it was in the process of isolating and sealing Mine No. 15 under supervision of the Department of Mines and Mineral Industries and upon completion and the inundating of the mine discharge from that mine at Duman Dam (and another discharge point under another permit not here relevant) would be completely eliminated until some future time when pumping would be resumed incident to mining of the "D" seam.

12. These plans represent a departure from the closure and drainage plans submitted by B & T in conjunction with its application for permit No. 567M035 in that the former contemplated and provided for high volume drainage and its treatment prior to closure of Mine No. 15 and reduced drainage and treatment at Duman Dam after closure of Mine No. 15, presumably from Mine No. 24 also covered by that permit.

13. Prior to granting the further extension sought with respect to permit No. 564M5 and in response to a departmental request, B & T submitted a map of the Mine No. 15

"B" seam and other information which represented in part that "[t]here will be no water pumped from this inundated area of the 'B' seam (Lower Kittanning), and all access points to this mine will be sealed with concrete. This includes portals, boreholes, shafts, etc. which will be completely isolated and there will be no sampling points. . . . Any water pumped to the surface . . . will be that which will be developed in the 'D' seam. . . ."

14. This reply letter of B & T referenced its request, the department inquiry and its reply to permit No. 567M035 (post-1965 amendment permit) rather than to permit No. 564M5.

15. By letter dated July 18, 1968, the Board advised B & T that it was granted a further extension of time to April 30, 1969, to complete mining operations covered by permit No. 564M5 subject to the same special conditions as imposed with respect to the first extension (F. F. 5). An acceptance form enclosed with the letter was accepted by B & T.

16. By letter of April 14, 1969, B & T requested a third extension of time from April 30, 1969, to May 20, 1969, of permit No. 564M5, assigning as the reason for the request a coal strike in the area.

17. By letter dated April 30, 1969, the Board granted the requested further extension for discharge from Mine No. 15 covered by permit No. 564M5 subject to the same conditions as imposed incident to the first extension granted and restated in the second extension. An acceptance form identical to those accepted by B & T with respect to the prior two extensions was enclosed but never accepted and returned to the Board by B & T.

18. By interoffice memo within B & T, it was suggested that the acceptance form not be returned or be

delayed in return to suit the convenience of B & T and the closing of Mine No. 15.

19. The last two extensions of permit No. 564M5 were sought by B & T and granted by the Board after application for permit No. 567M035 had been made by B & T and issued by the Board.

20. The last two extensions of time granted by the Board as to permit No. 564M5 were issued by the Board with knowledge that B & T was in the process of discontinuing the operation of Mine No. 15 upon completion of the program of isolating, sealing and inundating that mine as disclosed in the various documents submitted, and that there would be no anticipated discharge at the Duman Dam discharge point when the program was completed.

21. The mining of coal in Mine No. 15 ceased on May 10, 1969. However, after that date additional time was employed in removing equipment and constructing barriers and sealing operations which was consistent with Board policy of permitting additional time beyond the termination date of an extended permit for this type of activity.

22. By letter dated July 2, 1969, B & T advised the Department that all equipment would be removed and sealing of Mine No. 15 completed in approximately two weeks.

23. The closing of Mine No. 15 was completed in late July 1969, pumping at Duman Dam facility was terminated and the mine began to flood (inundate) as anticipated.

24. All procedures incident to sealing and closing Mine No. 15 met Department of Mines and Mineral Resources requirements but all access points were not sealed

with concrete as represented by B & T would be done in its material submitted to the Board incident to its application for permit No. 567M035.

25. Construction of a treatment facility at Duman Dam by B & T for treatment of drainage from the mining complex as represented by B & T in its various applications for extension of permit No. 564M5 and its application for permit No. 567M035 had not been undertaken at the time of final closure of Mine No. 15.

26. After Mine No. 15 had been closed, samplings of water level of the mine taken by B & T disclosed a rising water level in the mine. A later sampling indicated a level of 1,515 feet. At an elevation of 1,524 feet the pool level would be at the same elevation as the driftmouth of the mine posing a threat of discharge from the driftmouth to the West Branch of the Susquehanna River.

27. B & T did not advise the Department of the rising elevation of the mine pool. During this period it did confer with the Department of Mines and Mineral Industries concerning gas pockets developing in the flooding mine and a borehole was made to relieve this condition. This particular borehole was made at the point at which water level readings were made.

28. In the latter part of June 1970, a breakout occurred at the northeast end of Mine No. 15 which triggered this litigation as more fully set forth in the History of this Proceeding, *infra*.

29. There is no evidence in this case nor has any claim been asserted by the Commonwealth that B & T, or any of its predecessor operators of Mine No. 15, conducted mining operations contrary to applicable law then in effect or contrary to certificate No. 892, permits No. 14326 or No. 564M5 prior to any extension thereof.

30. In applying for the three extensions with respect to permit No. 564M5 and for permit No. 567M035, B & T did not intentionally violate or intend to deceive the Department or Board concerning any regulation, guideline or request of the Department or Board with respect to the submission of information, data, maps or other documents incident thereto.

31. That the meaning or interpretation of certain regulations or guidelines as understood by the staff of the Department or Board differed from the meaning or interpretation placed upon them by representatives of B & T is insufficient to find B & T as intending to deceive or mislead the Department or Board.

32. The Commonwealth, through its departments and agencies having jurisdiction over mining and mine drainage, was possessed of sufficient information, if utilized, to determine the advisability of granting and the imposition of appropriate conditions to extensions sought by B & T of permit No. 564M5 and the granting of permit No. 567M035 to assure compliance with the statutory law then in effect and regulations promulgated thereunder.

33. Both the Commonwealth and B & T share responsibility for the confusion and uncertainty surrounding the issuance of two extensions of permit No. 564M5 after permit No. 567M035 had issued.

Events Leading to and History of This Proceeding

In late June 1970, there was discovered a substantial discharge of acid mine water drainage into the West Branch of the Susquehanna River from the Buckwheat borehole of Mine No. 15 located at the northeast end of this mine, which condition prompted the Board to issue

an order dated July 7, 1970 suspending B & T permit No. 567M035 (the post-1965 amendment permit issued March 22, 1968 covering both Mines Nos. 15 and 24). The suspension was to remain in effect until (1) the Buckwheat borehole was plugged, (2) satisfactory treatment facilities were placed in operation and (3) satisfactory plans for prevention of pollution after cessation of mining had been submitted.

As a matter of fact mining of Mine No. 15 had ceased at least one year before the date of this suspension order, and pumping of mine discharge at the Duman Dam facility had been discontinued soon thereafter.

The suspension order, whatever its intended effect or legal effect may have been or was, did produce discussions between the Board and representatives of B & T which culminated in a Board order dated July 16, 1970, reinstating permit No. 567M035 subject to added special conditions and acceptance by B & T of the special conditions modifying the permit.

The special conditions set forth in the reinstatement order provide, *inter alia,* that:

"A. The company shall submit complete plans for the treatment of the discharge from the Lancashire Mine #15 by September 1, 1970, and shall maintain the discharge within limitations required by Board regulations.

"B. The company shall submit complete plans for the prevention of pollution after mining operations have ceased. Such plans shall be submitted no later than December 31, 1970."

Prior to the July 16, 1970, reinstatement order of permit No. 567M035, the Buckwheat borehole had been plugged (condition 1 of the suspension order of July 7, 1970), but the pool level in Mine No. 15 was rising to a level which threatened a discharge from a portal in the

general vicinity of the Buckwheat borehole now plugged. This problem was a subject of the discussions leading to the reinstatement order. Proposals were made by B & T to construct relief boreholes (to become known as the Maberry borehole) and build treatment facilities in that area for the liming of any discharge. The reinstatement order followed.

The Maberry borehole was constructed and treatment of its discharge began, but on July 23, 1970, another substantial discharge from Mine No. 15 through the earth's surface was discovered in the vicinity of and south of the plugged Buckwheat borehole. This discharge point became known as the breakout area. The surface elevation at the breakout area is 1,495 feet, which is lower than that at the new Maberry borehole.[2]

This new discovery precipitated another order by the Board dated July 28, 1970, again suspending permit No. 567M035, which order also provided, *inter alia:*

"2. On and after July 30, 1970, the Company is prohibited from operating the mine approved by the permit and is also prohibited from discharging mine drainage which does not meet . . . Board standards.

"3. The Company take immediate steps to prevent the acid discharge which emanates from Lancashire #15 mine from entering the West Branch of the Susquehanna."

Thereupon B & T ceased treatment of the discharge at Maberry which responsibility the Commonwealth as-

2. The quality and quantity of mine water discharge from Mine No. 15 at these two points was sharply disputed. It is not necessary to resolve this dispute, however, as the evidence clearly discloses the quantity to be substantial, exceeding a million gallons per day. Its acidity level was in excess of minimum water quality standards as clearly recognized by both parties in providing for and undertaking to treat the discharge with a liming process to reduce its acidity.

sumed on August 22, 1970. In the meantime the Commonwealth filed its original complaint in equity in this case on August 7, 1970 and B & T appealed to this Court from the Board order of July 28, 1970, the most recent suspension of the mentioned permit.

As originally filed, the complaint in equity sought to enjoin preliminarily and permanently the operation of Mines Nos. 15, 24-B and 24-D and to require B & T to take immediate steps to provide adequate treatment of discharge from Mine No. 15. A hearing on the Commonwealth's application for preliminary injunction was fixed but before the scheduled date and after B & T had answered the complaint, a stipulation of the parties dated August 26, 1970 was filed in this proceeding and presented to the Court which accepted the stipulation, made it a part of the record but was not asked to and did not issue a preliminary injunction.

Designed to provide a temporary solution to the problem pending determination of the litigation, the stipulation provided that the Commonwealth would continue its liming treatment of the discharge from No. 15 into the West Branch until B & T in accordance with specifications contained in the stipulation constructed and commenced operation of the Duman Dam pumping and treatment facility at the southwest end of the mine from which the treated discharge would flow into the headwaters of the Allegheny River watershed. It was expected that the pumping operation at Duman Dam would terminate the discharge at the Maberry borehole and breakout area at the northeast end of the mine.

Among the provisions in the stipulation, B & T agreed to operate the Duman Dam facility for a period of at least thirty days after which period it could, on five days notice to the Commonwealth, terminate operation of the facility.

In accordance with the stipulation, B & T constructed a treatment facility at Duman Dam and commenced the operation of that facility on November 1, 1970. It operated the facility from November 1, 1970 to February 22, 1971, on which date it ceased operating the facility after having given the Commonwealth five days prior written notice of such termination in accordance with the stipulation.

Within hours after B & T commenced operation of the Duman Dam facility on November 1, 1970, the discharge at the Maberry borehole location ceased.

On or about February 11, 1971, after the operation by B & T of the Duman Dam facility for over 100 days, the water level in Mine No. 15 was lowered to an elevation below the breakout area, and there has not been any significant discharge at that location since that date.

Another provision of the stipulation was one providing for administrative determination of the responsibility of B & T for abatement of pollution deriving from the discharge of Mine No. 15 and the legality of the suspensions to permit No. 567M035. Administrative adjudication has never taken place partly because of the demise of the Sanitary Water Board upon creation of the Department of Environmental Resources and partly because the original cooperation and concern of the parties as evidenced by the stipulation gave way to bickering and dispute.

On February 19, 1971, after B & T had given notice of its intent to discontinue the operation of the Duman Dam facility on February 22, 1971, the Commonwealth filed a Petition for Injunctive Relief in this proceeding pursuant to which it sought a special injunction, without hearing, requiring B & T to continue to operate the Duman Dam facility and a preliminary injunction, after hearing,

requiring B & T to continue to operate the facility pending a final decision based upon an administrative hearing which was then scheduled for March 2, 1971.

On February 19, 1971, this Court entered an order denying the Commonwealth's request for a special or ex parte preliminary injunction and fixed February 25, 1971 as the date for a hearing on the Commonwealth's request for a preliminary injunction.

On February 22, 1971, B & T ceased operating the Duman Dam facility, and its operation was taken over by the Commonwealth.

On February 25, 1971, this Court entered an order rescheduling the date for the hearing on the Commonwealth's application for a preliminary injunction for March 5, 1971 and directing that the administrative hearing fixed for March 2, 1971 be stayed.

The hearing on the Commonwealth's request for a preliminary injunction commenced on March 5, 1971 and was completed on March 25, 1971.

On March 17, 1971, the Commonwealth filed an amended complaint which consisted of four counts. In the first count, the Commonwealth sought relief against B & T on the same basis as alleged in its original complaint, that is, on the basis of orders issued by the Sanitary Water Board. In the last three counts of the amended complaint, the Commonwealth sought relief on the basis of new legal theories not raised in its original complaint.

On March 31, 1971, B & T filed its answer to the amended complaint.

On April 13, 1971, this Court issued a preliminary injunction providing for the continued operation of the Duman Dam facility pending the final determination of the case upon its merits, with the parties sharing the costs of such operation on an equal basis. Under the order, the

expenditures of the parties incurred by reason thereof were to follow the final judgment in the case and be recovered by the successful party.

Statutory History of Clean Streams Legislation in Pennsylvania

Before stating, discussing and resolving the legal issues raised in this litigation a recital of the statutory history of clean streams legislation in Pennsylvania will better focus the legal issues to the facts of the case.

The Act of June 22, 1937, P. L. 1987, 35 P. S. § 691.1 et seq., now known as The Clean Streams Law, as variously amended, is the current statutory law on the subject of clean streams. Prior to its enactment in 1937, there was in effect in Pennsylvania in the year 1915 (the year in which Mine No. 15 was first operated) the Act of April 22, 1905, P. L. 260, known as the Purity of Waters Act. This legislation regulated the discharge of sewage into the waters of the Commonwealth but significantly provided in Section 4 that the act was not to apply to "waters pumped or flowing from coal mines. . . ."

In 1923 the Act of June 14, 1923, P. L. 793, was enacted which empowered the Advisory Board of the Department of Health to promulgate orders and regulations for the protection of the water supply and the prevention of pollution. This act also provides that it was not to apply to ". . . any pollution or contamination caused by or resulting from water pumped or flowing from coal mines or water used in the preparation of coal."

These acts remained in effect until repealed by the original enactment of The Clean Streams Law, but the special status accorded mine drainage into the waters of the Commonwealth was conditionally continued. As originally enacted, Section 310 of The Clean Streams Law

specifically excluded from the provisions of Article III—Industrial Wastes ". . . acid mine drainage from coal mines until such time as, in the opinion of the Sanitary Water Board, practical means for the removal of the polluting properties of such drainage shall become known." There is no evidence that such a determination was ever made by the Sanitary Water Board prior to its demise.

In 1945 The Clean Streams Law was extensively amended by the Act of May 8, 1945, P. L. 435. The definitional section of the act (Section 1) was amended by redefining "establishment" to include coal mines, and "pollution" was broadened in meaning to include discharges from coal mines: Section 309, imposing penalties for discharge of industrial wastes into the waters of the Commonwealth, was amended to include acid mine drainage within its provisions.

However, equal application of the provisions of the act to coal mines and mine drainage as imposed with respect to industrial wastes and sewage generally was not to be accorded. Section 310, which previously excluded from its coverage acid mine drainage from coal mines, was amended, *inter alia*, to read:

"Except as hereinafter provided, the provisions of this article shall not apply to acid mine drainage from coal mines until such time as, in the opinion of the Sanitary Water Board, practical means for the removal of the polluting properties of such drainage shall become known.

"It shall be unlawful and a nuisance to discharge or to permit the discharge, of acid mine drainage (1) into 'clean waters' of the Commonwealth which are being devoted or put to public use at the time of such discharge; or (2) into 'clean waters' of the Commonwealth, unless the Commonwealth, after the Sanitary Water Board has approved plans of drainage pursuant to section three hun-

dred thirteen hereof, and has set a reasonable time not to exceed one year within which such pipes, conduits, drains, tunnels or pumps as may be necessary to receive such acid mine drainage at the point or points where such acid mine drainage is delivered, as provided in this section, shall be constructed and put into operation by the Commonwealth, has failed to construct and put into operation the same within such time: Provided, That nothing in this amendatory act shall be construed to limit or affect the provisions of section seven hundred one of the act to which it is an amendment."

And a new Section 313 was added which provided, *inter alia,* as follows:

"Before any existing or new coal mine may be opened or reopened, and before any existing coal mine may be continued in operation, a plan of the proposed drainage and disposal of industrial wastes, and acid mine drainage of such mine, shall be submitted to the Sanitary Water Board, and it shall be unlawful to open or reopen any such mine, or to continue the operation of any mine, or to change or alter any already approved plan of drainage and disposal of industrial wastes, and acid mine drainage from such mine, unless and until the board, after consultation with the Department of Mines has approved such plan or change of plan. . . ."

Certificate No. 892 and permits No. 14326 and No. 564M5 were issued under the provisions of The Clean Streams Law as amended by the 1945 amendments.

The 1965 amendments to The Clean Streams Law enacted by the Act of August 23, 1965, P. L. 372, are critical amendments with respect to several legal issues raised in this case. As previously noted, the significance of and application of the 1965 amendments to the extensions of time granted under permit No. 564M5 and the

issuance of permit No. 567M035 under the 1965 amendments is a source of great dispute between the parties.

The 1965 amendments, generally speaking, eliminated the distinction between and different treatment accorded the discharge of acid mine drainage into "clean" and "unclean" waters of the Commonwealth and gave the Sanitary Water Board regulatory powers over all such discharges.

By adding a new Section 4 the General Assembly found that preexisting law had failed to prevent an increase in the miles of polluted water of the Commonwealth, that prior special provisions for mine drainage, a major cause of stream pollution, discriminated against the public interest, that its polluted waters jeopardized the economic future of the Commonwealth and that clean unpolluted streams are essential to such future development. It also declared as a matter of policy that not only prevention of further pollution is essential but also the restoration and reclamation of polluted waters was equally essential.

To implement these findings and policy declarations acid mine drainage was brought within the definition of industrial waste. Thus discharge of acid mine drainage became subject to Section 307 of the Act. That section as originally enacted in 1937 provided in part:

"No person shall hereafter erect, construct or open, or reopen or operate, any establishment which, in its operation, results in the discharge of industrial wastes which would flow or be discharged into any of the waters of the Commonwealth and thereby cause a pollution of the same, unless such person shall first provide proper and adequate treatment works for the treatment of such industrial wastes, approved by the board, so that if and when flowing or discharged into the waters of the Commonwealth the effluent thereof shall not be inimical or injurious to the public health or to animal or aquatic life, or prevent

the use of water for domestic, industrial or recreational purposes. . . ."

The 1965 act also added a new Section 315, which reads:

"(a) Before any coal mine is opened, reopened, or continued in operation, an application for a permit approving the proposed drainage and disposal of industrial wastes shall be submitted to the Sanitary Water Board. The application shall contain complete drainage plans including any restoration measures that will be taken after operations have ceased and such other information as the board by regulation shall require.

"(b) It shall be unlawful to open, reopen, or continue in operation any coal mine, or to change or alter any approved plan of drainage and disposal of industrial wastes, unless and until the board, after consultation with the Department of Mines and Mineral Industries, has issued a permit approving the plan or change of plan. A permit shall not be issued if the board shall be of the opinion that the discharge from the mine would be or become inimical or injurious to the public health, animal or aquatic life, or to the use of the water for domestic or industrial consumption or recreation. In issuing a permit the board may impose such conditions as are necessary to protect the waters of the Commonwealth. The permittee shall comply with such permit conditions and with the rules and regulations of the board.

"(c) The board may modify, suspend or revoke any permit issued pursuant to this section. Such action may be taken if the board finds that a discharge from the mine is causing or is likely to cause pollution to waters of the Commonwealth or if it finds that the operator is in violation of any provision of this act or any rule or regulation of the Sanitary Water Board. An order of the board

modifying, revoking or suspending a permit shall take effect upon notice from the board, unless the order specifies otherwise. Any party aggrieved by such order shall be given the opportunity to appear before the board at a hearing at which the board shall reconsider its order and issue an adjudication, from which the aggrieved party may appeal in the manner provided by the 'Administrative Agency Law,' act of June 4, 1945 (P. L. 1388), as amended. The right of the board to suspend or revoke a permit is in addition to any penalty which may be imposed pursuant to this act.

"(d) Any permit approving the drainage and disposal of industrial wastes from a coal mine and issued by the board prior to the effective date of this act shall be deemed to be a permit issued pursuant to this section. The permit shall be valid for one year from the effective date of this act or for such additional period as the board might allow. Nothing herein shall limit the board's power to modify, suspend, or revoke any such permit under the provisions of subsection (c) of this section."

Although the most recent amendments to the Act postdate the events of this case, the changes effected have bearing upon several issues raised. These latest amendments are found in the Act of July 31, 1970, P. L. 653. Section 315 was again amended and contains this significant provision:

"A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1, 1966, under circumstances requiring a permit from the Sanitary Water Board under the provisions of Section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P. L. 372)."

Finally, note should be made of legislation enacted in 1955 and 1965 dealing with the problem of pollution of

the waters of the Commonwealth by mine drainage from abandoned mines. Shortly after the 1965 amendments to The Clean Streams Law were passed, legislation was enacted which required the Commonwealth to initiate a program for the correction of pollution from abandoned mines. Such legislation was contained in the Act of December 15, 1965, P. L. 1075, 35 P. S. § 760.1, which provided as follows:

"The Secretary of the Department of Mines and Mineral Industries shall initiate an immediate action program to correct pollution from abandoned deep and strip mines on each of the watersheds in the Commonwealth of Pennsylvania."

In 1955, both State and Federal funds were made available to enable the Commonwealth to discharge its obligations with respect to drainage from abandoned coal mines. Section 4 of the Act of July 7, 1955, P. L. 258, as amended, 52 P. S. § 685, appropriated $8,500,000.00:

". . . to match Federal moneys made available for the control and drainage of water from anthracite coal formations, to seal abandoned coal mines and to fill voids in abandoned coal mines. . . ."

Section 2 of this Act, 52 P. S. § 683, provided that in the event matching Federal funds became available for this purpose, "[T]he Department of Mines and Mineral Industries shall . . . purchase and install pumps, pipes, machinery, equipment and materials for the purpose of pumping water from abandoned mines, and shall seal abandoned coal mines and fill voids in abandoned coal mines in those instances where such work is in the interest of public welfare. . . ."

Matching Federal funds were authorized in 1955 by the Mine Dewatering Act, Act of July 15, 1955, P. L. 87-818, as amended, 30 U. S. C. A. § 571 et seq.

After the passage of the above-mentioned legislation in 1965, funds were made available for this program by The Land and Water Conservation and Reclamation Act, Act of January 19, 1968, P. L. (1967), 996, 32 P. S. § 5101 et seq. This Act spoke specifically in terms of using such funds for the construction of treatment facilities by the Commonwealth. Thus, $150,000,000.00 was allotted under the Act to be used by the Commonwealth for this purpose and otherwise preventing, controlling and eliminating stream pollution from mine drainage.

The Legal Issues

The Commonwealth poses the issues involved in five basic questions. In its counterstatement, B & T poses six basic questions, the first of which, by reason of its general nature, includes the first three questions posed by the Commonwealth. The Commonwealth's fourth question is within the scope of B & T's second question. The fifth and sixth questions posed by B & T—which encompass the fifth question of the Commonwealth—pose constitutional questions and issues of estoppel, laches and waiver against the Commonwealth which need not be considered because of our disposition of the case on other grounds.

Based upon our findings of fact, we view the legal issues to be within the first four questions posed by the Commonwealth and the first three posed by B & T and restate them to be:

1. Under the provisions of The Clean Streams Law then in effect, did B & T as a holder of time extended permit No. 564M5 or permit No. 567M035 (the 1965 amendment permit) assume responsibility for mine water discharge from Mine No. 15 after cessation of mining and thereby also become responsible for its treatment to meet

minimum water quality standards established by the Commonwealth?

2. Did the mine water discharge emanating from Mine No. 15 impose any responsibility upon B & T for abatement of the polluting qualities of the discharge under Section 316 of The Clean Streams Law as then in effect?

3. Did the mine water discharge emanating from Mine No. 15 constitute a public nuisance under Section 3 of The Clean Streams Law as then in effect for which B & T is responsible and which it must abate?

4. Did the mine water discharge emanating from Mine No. 15 constitute a common law public nuisance for which B & T is responsible and which it must abate?

Discussion

First Issue

There can be no question that prior to May 8, 1945—the effective date of the 1945 amendments to The Clean Streams Law—there were no provisions in our relevant statutory law which specifically prohibited, regulated or authorized the administrative regulation of mine drainage discharge into the waters of the Commonwealth regardless of its polluting qualities or whether such discharges occurred during or after cessation of mining.

To the contrary, during the first thirty year period of the operation of Mine No. 15 by B & T and its predecessors, legislation on the subject of water pollution—however wise or unwise it might appear in retrospect—specifically excepted mine drainage from its coverage or from regulation.

In 1915, the Legislature first gave limited recognition to the reality that uncontrolled mine drainage discharge

into the waters of the Commonwealth was inimical to an ultimate objective of pollution free waters. From 1945 to January 1, 1966—the effective date of the 1965 amendments to the Act—The discharge of acid mine drainage into "clean" waters of the Commonwealth was declared unlawful and to be a nuisance. To enforce this newly declared legislative policy, existing mines, reopened mines and newly opened mines were subjected to regulation through the requirement of obtaining approved plans of drainage from the Sanitary Water Board (Section 310, as amended, and Section 313, as added to the Act by the 1945 amendments). During this period, B & T operated Mine No. 15 under an approved plan of mine drainage into the West Branch of the Susquehanna River and later into headwater streams of the Allegheny River basin under certificate No. 892, permit No. 14326 and permit No. 564M5 (also covering Mines Nos. 24-B and 24-D) without any requirement for treatment of discharge during or after cessation of mining.

Although not controlling nor directly on point in the legal issue under consideration, the decision of the Dauphin County Court in *Sanitary Water Board v. Sunbeam Coal Corporation*, 91 Dauph. 70, 47 D. & C. 2d 378 (1969), is worthy of notation here. In that case, the court was concerned with the issue of whether the Sanitary Water Board had the power, under the 1945 amendments, to deny a permit for an operating mine because of alleged violations of two other permits which had been issued by the Board to cover mines which were later closed. In holding that the Board did not have such power, the court stated:

"Of further significance is the fact that the Clean Streams Act specifically referred to mines being *opened, reopened or continued in operation.* Nowhere in the

Clean Streams Act is it suggested or implied that a former operator of an abandoned mine can be held in 'violation' after the mine is closed. Even in the case of Sanitary Water Board v. Sunbeam Coal Corp., 77 Dauphin 264 (1961), wherein we held that future plans for the drainage of acid mine water after a mine closed could be required of an applicant at the time of originally applying for a permit, does not constitute authority for the proposition that an applicant can be held in 'violation' of a permit after the mine is closed, when he followed the plans approved by the board.

"Once the Sanitary Water Board has approved a drainage plan and the drainage plan has been followed, the responsibility of the operator ought not to be increased after the mine has ceased any longer to be a mine." (Emphasis added.) 91 Dauph. at 76-77.

Thus it has been judicially declared, and we believe correctly, that the 1945 amendments to the Act with respect to obtaining approved plans of mine drainage were applicable only to then operating mines, those reopened or newly opened ones, and if the approved plan was complied with, sanctions could not be imposed after cessation of mining for other "violations."

This brings us to the 1965 amendments to the Act. Their proper construction, the meaning of regulations promulgated thereunder and their application to the facts of this case are the prime issues in dispute. Although this case has received wide publicity and has been characterized as one of major importance in the environmental field, its unique facts surrounding the extensions granted under the pre-1965 amendments permit and the issuance of a 1965 amendment permit will make it of little precedent value for the future.

As previously noted, the 1965 amendments to the Act represented a major change of legislative policy

towards the problem of mine drainage and pollution of the waters of the Commonwealth. Acid mine drainage was brought within the definition of industrial wastes and thereby becomes subject to Section 307 of the Act (last amended in 1945), which provides in part that "[n]o person shall hereafter . . . operate, any establishment which, *in its operation*, results in the discharge of industrial wastes which would flow or be discharged into any of the waters of the Commonwealth and thereby cause a pollution of the same. . . ." (Emphasis added.) For the first time then, the discharge of acid mine drainage into polluted waters was prohibited in Pennsylvania, *Pittsburgh Coal Company v. Sanitary Water Board*, 4 Pa. Commonwealth Ct. 407, 286 A. 2d 459 (1972).*

Of primary concern here is new Section 315 added to the Act by the 1965 amendments. Directly applicable to coal mines, it makes it unlawful to operate a coal mine without a mine drainage permit, the application for such a permit to "contain complete drainage plans including any restoration measures that will be taken after operations have ceased and such other information as the board by regulation shall require." The Board is also authorized to ". . . impose such conditions as are necessary to protect the waters of the Commonwealth." (Subsection (a) and (b) of Section 315).

Notwithstanding the declared change of legislative policy and the interdictions of Sections 307 and 315 against acid mine drainage pollution of our waters, subsection (d) of Section 315 afforded a limited exception to their application. It provided that any permit approving a mine drainage plan issued prior to January 1, 1966, ". . . shall be deemed to be a permit issued pursuant to this section . . . [and] shall be valid [until January 1, 1967] or for such additional periods as the board might allow."

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* Allocatur to Supreme Court granted March 24, 1972.

The foundation of the Commonwealth's argument on this first issue rests upon B & T's application for and the issuance of a mine drainage permit under the 1965 amendments (permit No. 567M035). From this fact the Commonwealth reasons that B & T subjected itself to responsibility for the mine drainage from Mine No. 15 after cessation of mining because (a) Section 315 statutorily imposed such responsibility upon B & T, (b) the Board regulations and conditions attached to the permit imposed such responsibility, or (c) such responsibility would have been placed upon B & T by provisions of the permit had the Commonwealth not been misled or deceived by B & T incident to its issuance.

B & T counters by asserting that it never operated Mine No. 15 under the 1965 amendment permit but completed its operation and closed the mine under the pre-1965 permit as extended by law and further extended by Board action. It also argues that Section 315 does not statutorily impose such responsibility upon B & T nor do the regulations adopted thereunder.

Whether Mine No. 15 was operated during the critical period from January 1, 1966 to cessation of mining on or about May 31, 1969, under extensions of permit No. 564M005 or under permit No. 567M035, while a source of great controversy between the parties, is not in our opinion a controlling fact.

Rather, we view the first issue raised to turn on two essential questions. Did the 1965 amendments statutorily impose upon B & T responsibility for the post-mining discharge from Mine No. 15? If not, did the Act empower the Sanitary Water Board, as an element of an approved plan of drainage, to require a mine operator to assume responsibility for post-mining discharge? If so, then a further question of mixed law and fact arises as to whether

or not B & T assumed such responsibility via its extensions of permit No. 564M005 or permit No. 567M035.

The 1965 amendments, while explicitly bringing mine drainage within the coverage of the Act as an industrial waste and equally explicitly requiring permits containing complete drainage plans for operating mines, are nevertheless silent on the subject of responsibility for mine discharges from then abandoned or closed mines or those thereafter closed.

As to its applicability, the title of the 1965 amendatory act required "permits for the *operation* of coal mines" and continued the scheme of the 1945 amendments, which applied to mine drainage discharge into "clean" waters of the Commonwealth. The language found in subsections (a) and (b) of Section 315 is identical in substance to that contained in Section 313 of the Act as amended in 1945, and upon which the Court in the *Sunbeam* case relied in holding that the Act applied only to operating mines. Permits were required only as to a mine "opened, reopened or continued in operation." Without exception, throughout the 1965 amendments, they speak only to duties and responsibilities of operators and the power of the Board as to such operators.

Significantly, in the same year 1965, the Legislature recognizing the problem of mine drainage from abandoned mines to be a problem requiring State action if the legislative policy enunciated in the 1965 amendments was to be achieved, passed the Act of 1965 providing for a massive attack by the State itself with respect to mine drainage from abandoned mines.

Of greater significance, however, are the 1970 amendments to the Act. Section 315, as most recently amended, for the first time specifically addresses itself to the subject of responsibility for post-mining discharge. After pro-

hibiting discharge of mine drainage into the waters of the Commonwealth without a permit or contrary to the rules and regulations of the Board, it then declares that "a discharge which occurs after mining operations have ceased" is subject to the regulatory powers of the Board.

In arguing that the 1965 amendments imposed statutory responsibility upon mine operators for mine discharge after a mine is closed, the Commonwealth primarily relies upon the last sentence of subsection (a) of Section 315 that a permit application contain a drainage plan "including *any* restoration measures that will be taken after operations have ceased." In this language we can find no such legislative intent, explicit or implied. At most, it arguably supports the right of the Board to require a mine operator to assume responsibility for post-mining discharge as a condition to obtaining a permit under an approved mine drainage plan.

Considering the title of the 1965 amendatory act (*see Comomnwealth v. Derstine,* 418 Pa. 186, 210 A. 2d 266 (1965); *City Stores Company v. Philadelphia,* 376 Pa. 482, 103 A. 2d 664 (1954), its limitation of reference to operators of coal mines and the 1970 amendments to the act, we are persuaded that prior to 1970 the *statute itself* did not impose responsibility upon mine operators for post-mining discharge.

Turning next to the question of whether the Act as then in force empowered the Board to require a mine operator to assume responsibility for post-mining discharge as part of an approved drainage plan upon which a permit is issued, we believe that such right existed in the Board under Section 315(a) and its general rule making power under Section 403 of the Act. This view is consistent with that expressed by the Dauphin County Court prior to the 1965 amendments to the Act in the first *Sunbeam* case, *Sanitary Water Board v. Sunbeam Coal Corp.,* 77 Dauph. 264 (1961), and is not disputed by B & T. This bring us to the third question.

Considering B & T's application for extensions of time under permit No. 564M005 and its application for the 1965 amendments permit and the standard and special provisions imposed by the Board in granting them, did B & T thereby assume responsibility for mine drainage from Mine No. 15 after cessation of mining?

As stated in our finding of fact, we have concluded that B & T in its application for the 1965 amendment permit (No. 567M035) did not intentionally deceive or mislead the Board but made such application consistent with its understanding of the requirements of the regulations and those set forth in Mine Drainage Manual (CX70) issued by the Board. Also, we have found that both B & T and the Board must share equal responsibility for the confusion surrounding issuance of and actions taken under the granting of extensions to permit No. 561M005 and permit No. 567M035 during the critical period in question.

We particularly mention these findings here as illustrative of the inconsistent arguments advanced by the Commonwealth to place responsibility on B & T for the mine drainage in question. Strenuously contending that it was misled and deceived, the essence of one argument of the Commonwealth is that if it had been given the facts it would have imposed post-mining discharge responsibility on B & T under its regulatory powers. This can hardly support another of its contentions that the Board *in fact* did impose such responsibility on B & T under permit No. 567M035.

Nor, in our opinion, did the Board, by regulation then in effect or by any standard or special condition incorporated into extensions of permit No. 564M005 or permit No. 567M035 impose any such responsibility upon B & T.

No such regulation was introduced into evidence. Presumably none existed. The contents of Article 900 of the Board regulations (CX4) and its "guide" captioned "The Mine Drainage Manual of the Board" (CX10) contain only one specific reference to post-mining drainage and both speak to the subject of mine drainage plans and closing procedures showing how a pollutional discharge *will be prevented* after completion of mining. With the exceptions of these references the regulations and manual direct themselves to operating mines, whether newly opened, reopened or continuing in operation. In these documents we cannot find that a permittee lawfully operating a mine consistent with an approved plan of drainage and sealing its consistent with prescribed closing procedures is also held responsible for post-mining drainage. The thrust of the regulation is towards closing procedures designed to *prevent* post-mining drainage and not to correction of such a condition if it does occur.

An examination of the Standard Conditions Accompanying Permits "Authorizing the Operation of Mines" (CX10) compels the same conclusion. Particular "standard conditions" were incorporated by reference into the extensions of permit No. 561M005 and into permit No. 567M035. None of these incorporated standard conditions, in our opinion, impose responsibility by regulation upon B & T for mine discharge from Mine No. 15 after it was closed.

As noted above with respect to Article 900 of the Regulations and the "Manual," these "standard conditions" speak to and encompass only operating mines, their drainage plans and closing procedures to *prevent* post-mining discharge. We can find not one single provision in any of these documents that clearly or even inferentially imposes any such responsibility upon B & T as a condition of its permits.

Rules and regulations of administrative agencies, lawfully adopted, are subject to the same rules of statutory construction as statutes themselves but obviously cannot be construed to afford a greater power or right in an administrative agency than that imposed by the statute itself. The Commonwealth argues that the legislative intent as manifested in the declaration of policy and legislative findings contained in the 1965 amendments compels a conclusion that the statute itself imposes post-mining discharge responsibility upon a former operator as do the Board's regulations consistent with such expressed legislative intent. Considering the legislative history of clean streams legislation both prior and subsequent to the 1965 amendments to The Clean Streams Law, there can be no doubt that the Legislature was fully aware of and conversant with the complex problems surrounding mine drainage from closed mines whether they be characterized as having been abandoned or otherwise. It is inconceivable that if in 1965 it intended to place responsibility as argued by the Commonwealth, it would leave the question open to inference.

Second Issue

As a separate count in its amended complaint the Commonwealth asserts by reason of the provisions of Section 316 of the Act that B & T is responsible for the mine water discharge emanating from Mine No. 15 as the "landowner" holding title to or having proprietary interests in the land encompassing the mine.

Section 316 was *added* to The Clean Streams Law by the 1965 amendments. As originally added this section merely empowered the Sanitary Water Board to authorize access by mine operators, government personnel and others onto the lands of others who refused such access where conditions on such land resulted in pollution

of the waters of the Commonwealth. Essentially, its provisions afforded a new tool to combat pollution.

It was not until the 1970 amendments to Section 316 were enacted (effective July 31, 1970) that the legislature imposed a conditional and limited responsibility upon landowners or occupiers for the correction of conditions which caused or posed a danger of pollution.

Apart from constitutional questions raised by the imposition of such responsibility upon landowners apparently without regard to causation or fault, the Legislature, in continued recognition of the special consideration historically afforded the mine drainage problem, excepted landowners from the cost of correcting the polluting condition under certain circumstances.

As amended in 1970, Section 316 now provides:

"Whenever the Sanitary Water Board finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the board may order the landowner or occupier to correct the condition in a manner satisfactory to the board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, 'landowner' includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

"For the purpose of collecting or recovering the expense involved in correcting the condition, the board may assess the amount due in the same manner as civil penalties are assessed under the provisions of section 605 of this act: Provided, however, That if the board finds that the condition causing pollution or a danger of pollution resulted from mining operations conducted prior to January 1, 1966, or, if subsequent to January 1, 1966, under circumstances which did not require a permit from the Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P. L. 372), then the amount assessed shall be limited to the increase in the value of the property as a result of the correction of the condition."

There is no evidence in this record that the Sanitary Water Board or the Department issued any order at any time against B & T as a "landowner" under the provisions of this section. It is also clear from the record that all operative facts material to the cause of action here asserted by the Commonwealth occurred prior to the effective date of the 1970 amendments on July 31, 1970. Nonetheless, some eight months after filing its original complaint, the Commonwealth now asserts liability on the part of B & T under this section. Among the contentions advanced by the Commonwealth to overcome the obvious barriers it faces is one to the effect that its order of July 28, 1970 (suspending for the second time permit No. 567M035), was "intended" to be and should be considered to be an order under Section 316. As the 1970 amendments were not then in effect such a contention is not only specious but also illustrative of the total lack of persuasive support for the Commonwealth's position on this legal issue.

The inescapable conclusion is that the Commonwealth could not have intended and had never attempted to employ the power given to it under Section 316 with respect to the mine drainage in question. We need not, therefore, reach the question of whether or not its provisions unqualifiedly and absolutely impose upon a "landowner" responsibility for pollution by mine drainage from his lands and, if so, whether such a provision is constitutional if such responsibility is imposed without regard to causation or fault.

Third Issue

Another theory advanced by the Commonwealth in its amended complaint is that under Section 3 of The Clean Streams Law the discharge of acid mine drainage from Mine No. 15 into the waters of the Commonwealth constitutes a statutorily declared public nuisance which B & T has a duty to abate.

As originally enacted Section 3 of the Act provided:

"Discharge of Sewage and Industrial Wastes Not a Natural Use.—The discharge of sewage or industrial waste or any noxious and deleterious substances into the waters of this Commonwealth, which is or may become inimical and injurious to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, is hereby declared not to be a reasonable or natural use of such waters, to be against public policy and to be a public nuisance."

Its text remained the same until the 1970 amendments, when it was amended to read:

"Discharge of Sewage and Industrial Wastes Not a Natural Use.—The discharge of sewage or industrial waste or any substance into the waters of this Commonwealth, which causes or contributes to pollution as herein defined or creates a danger of such pollution is hereby declared not to be a reasonable or natural use of such waters, to be against public policy and to be a public nuisance."

The history of The Clean Streams Law and its amendments in 1945, 1965 and 1970, as heretofore set forth, bear upon this issue and will not be repeated here. It should be recalled, however, that a 1965 amendment further defined the term "industrial waste" (Section 1 of the Act) to include "mine drainage" incident to broad amendments to the Act which at the same time gave the Sanitary Water

Board regulatory powers over all such discharges and in essence eliminated the distinction between and different treatment accorded mine drainage into "clean" and "unclean" waters of the Commonwealth which theretofore existed.

In resolving this issue we must also consider the provisions of Section 701 of the Act which provides, as it has since 1937:

"Existing Rights and Remedies Preserved.—The collection of any penalty under the provisions of this act shall not be construed as estopping the Commonwealth, or any district attorney or solicitor of a municipality, from proceeding in courts of law or equity to abate pollutions forbidden under this act, or abate nuisances under existing law. It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate the pollution of the waters of this Commonwealth, and nothing in this act contained shall in any way abridge or alter rights of action or remedies now or hereinafter existing in equity, or under the common or statutory law, criminal or civil, nor shall any provision of this act, or the granting of any permit under this act, or any act done by virtue of this act, be construed as estopping the Commonwealth, persons or municipalities, in the exercise of their rights under the common law or decisional law or in equity, from proceeding in courts of law or equity to suppress nuisances, or to abate any pollution now or hereafter existing, or enforce common law or statutory rights."

In advancing this argument the Commonwealth relies upon and asserts to be controlling the case of *Commonwealth ex rel. Shumaker v. New York & Pennsylvania Company, Inc.*, 367 Pa. 40, 79 A. 2d 439 (1951). We cannot agree. On the contrary, if it can be cited as supporting either party in this litigation as to this issue, it could more aptly be cited by B & T.

In *Shumaker*, the polluting subject was industrial waste from a pulp and paper mill operation intentionally discharged into clean waters of the Commonwealth. As the Commonwealth correctly points out, our Supreme Court clearly held that the purpose of Section 701 was to preserve any and all remedies or rights of action that were historically available to abate pollutional discharges that constituted public nuisances, and the Commonwealth was not restricted to remedies otherwise specifically provided by the Act. However, as to statutorily declared nuisances as distinguished from common law nuisances, we cannot agree that the Legislature, at least until 1965, declared the discharge of mine drainage into the waters of the Commonwealth regardless of their purity to be prohibited and violative of Section 3 of the Act independent of and without regard to all other provisions of the Act. To so declare would be to close one's eyes to the provisions of The Clean Streams Law as originally enacted and as amended in 1945, 1965 and 1970 and would render practically meaningless the original exclusion of mine drainage from its original provisions and the gradual elimination of the exclusion culminating in the amendments of 1970. In *Shumaker*, there was never any question that the discharge there involved was an industrial waste as defined by the Act, that its discharge into the waters of the Commonwealth was absolutely prohibited without exception or qualification and that because the case was decided on pleadings taken to be true, the waters of the Commonwealth there involved were considered to be clean, which is not the case here.

In our opinion, considering the legislative enactments predating The Clean Streams Law, its original provisions and the history of its amendments to the year 1970, the conclusion is inescapable that prior to 1945, mine drainage into the waters of the Commonwealth, clean or otherwise polluted, was not statutorily declared as a public nuisance; that in 1945 it was so declared as to discharge into "clean" waters of the Commonwealth and it was not until 1965 that mine drainage was unequivocally so declared. The Commonwealth has never asserted that the waters of the Commonwealth here involved were clean waters and all the evidence is to the contrary. Hence, as to the operative facts of this case it cannot be concluded that the discharge of acid mine drainage of Mine No. 15 constituted a statutorily declared public nuisance contrary to Sections 3 and 310 of the Act and thereby preserved for enforcement under Section 701 of the Act.

Fourth Issue

Apart from and independent of any alleged responsibility of B & T under statutory law, the Commonwealth here asserts that the mine drainage discharge from Mine No. 15 after cessation of mining constitutes a common law nuisance for which B & T is responsible as the creator of the harmful condition and as the owner or having proprietary interests in the land and its subsurface.

In approaching this issue it is imperative that there be kept in mind the history of the operation and closure of Mine No. 15 and the statutory law in effect during these periods. Although the authorities cited by each of the parties with respect to this issue are instructive, none were decided within the context of the facts of this case. At best they afford precedent and guidance for general principles of law which bear upon but are not decisive of the issue here raised.

The mine drainage discharge which the Commonwealth contends to be the nuisance to be abated (in entering the waters of the Commonwealth) is post-mining

discharge after cessation of mining which occurred as a natural result of the previous mining operations coupled with the volume and flow of surface and subsurface waters in the Barnesboro Basin.

The physical characteristics of Mine No. 15 after cessation of mining and its sealing might aptly be described as an artificial condition of the subsurface of the land created by the conduct of B & T and its predecessors. Its location at the lowest subsurface elevation of the Barnesboro Basin, however, is a natural phenomena, as is the gross volume of surface and subsurface water which by reason of percolation and subsurface flow finds its way into Mine No. 15 by the force of gravity. Although sharply disputed by the experts for the respective parties as to the source of the total volume of subsurface water "generated" in Mine No. 15—some of it said to be "fugitive" water from surrounding mines of higher subsurface elevation—the fact remains that this artifically created subsurface condition because of its location produced a receptacle for underground water—whatever its source—which receptacle, again because of the forces of nature, overflowed. In doing so, it breached the land surface and entered the waters of the Commonwealth.

Under these circumstances, can it be said that a common law nuisance exists for which B & T is wholly or partially responsible either as the creator of a harmful condition or as the owner or possessor of the land on which the condition exists?

The futility of attempting—and perhaps the wisdom of not attempting—to define a public nuisance at common law and its operative elements to which proven facts in any given case can be applied is evident in the decisional law of Pennsylvania on the subject. A careful analysis of many cases discloses no such definition but only a

montage of particular elements apparently considered to be controlling and from which it was concluded that a public nuisance did indeed exist.

The distinction between a public nuisance and a private nuisance, as such, poses no particular problem. The former is one that offends the public at large or a segment of that public while the latter offends only a particular person or persons. A distinction drawn between nuisances in fact and nuisances per se is also found in many cases both with respect to private and public nuisances; a nuisance per se being something which is generally recognized as injurious to health or welfare of the community so that proof of the nuisance may be made simply by proof of the act. *Hostetter v. Sterner's Grocery, Inc.*, 390 Pa. 170, 134 A. 2d 884 (1957). But such a definition of a nuisance per se is overbroad and simplistic, as its application in already decided cases would surely have produced a result contrary to that actually reached.

The decisional law of Pennsylvania within the limited subject of the pollution of streams by mining operations affords some guidance in determination of the issue under consideration, but in our opinion falls far short of controlling its outcome.

In *Pennsylvania Coal Company v. Sanderson*, 113 Pa. 126, 6 A. 453 (1886), an early landmark case of *private* nuisance, it was held that, in the operation of mining in the ordinary and usual manner, the operator of the mine may, upon his own lands lead the water which percolates into his mine into the streams which form the natural drainage of the basin although the quantity as well as the quality of the water in the stream may thereby be affected, without liability to lower riparian owners for increased quantity or for rendering the water unfit for domestic and other purposes. The court said:

"The right to mine coal is not a nuisance in itself. It is, as we have said, a right incident to the ownership of coal property, and when exercised in the ordinary manner, and with due care the owner cannot be held for permitting the natural flow of mine water over his own land, into the water course, by means of which the natural drainage of the country is effected.

"There are, it is well known, percolations of mine water into all mines; whether the mine be operated by tunnel, slope or shaft, water will accumulate, and, unless it can be discharged, mining must cease. The discharge of this acidulated water is practically a condition upon which the ordinary use and enjoyment of coal lands depends; the discharge of the water is therefore part and parcel of the process of mining, and as it can only be effected through natural channels, the denial of this right must inevitably produce results of a most serious character to this, the leading industrial interest of the state.

"The defendants were engaged in a perfectly lawful business, in which they had made large expenditures, and in which the interests of the entire community were concerned; they were at libert, to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control; as the mining operations went on, the water by the mere force of gravity ran out of the drifts and found its way over the defendant's own land to the Meadow Brook. It is clear that for the consequences of this flow, which by the mere force of gravity, naturally, and without any fault of the defendants, carried the water into the brook and thence to the plaintiff's pond, there could be no responsibility as damages on the part of the defendants." 113 Pa. at 146-47, 6 A. at 457.

While subsequent decisions have declared that *Sanderson* must be strictly limited to its facts,[3] it has never been overruled. The most salient of its facts were that the stream in question was *already polluted* and that the mine water *flowed naturally* from the mine.

In *McCune v. Pittsburgh and Baltimore Coal Company,* 238 Pa. 83, 85 A. 1102 (1913), also a private nuisance case, it appeared that mine water was accumulated at the bottom of a bore hole, pumped to the surface and thence discharged into a stream of clean water running through plaintiff's property making the stream water unfit for domestic or farm use. The Supreme Court affirmed per curiam on the opinion of the lower court which said:

"If the doctrine of the Sanderson case is not to be extended, as we are admonished by the Supreme Court, it is clear that we have no right to give it application here. The cases are unlike in nearly every essential particular. If the remedy sought be denied, this court must go far beyond the Sanderson case and hold that a mine owner can divert the natural flow of the water in the mine, raise it artificially to the surface and thereby destroy a pure stream of water on higher ground. The principle involved is of far reaching consequence. The exception introduced in the Sanderson case has resulted in the pollution of nearly every stream in the western end of the State and it has become a serious problem how to obtain pure water sufficient to supply the inhabitants.

". . . A prima facie case would have been made out for plaintiff by showing that a stream of pure water flowing through his land was polluted by the action of defendant in pumping mine water from a lower level. Under

3. *See Getting v. Union Improvement Co.*, 7 Kulp 493 (1895), and *Williams v. Union Improvement Co.*, 6 Kulp 417 (1892).

such circumstances an action would lie under the maxim sic utere. The burden then undoubtedly would be on defendant to show that the natural use of his property made such injury unavoidable. . . .

"The defendant has failed to establish that the injury was unavoidable or to prevent it would necessitate such expense as would deprive it of the use of its property. There was no attempt to show that an opening which would afford natural drainage for the mine water was impracticable, and the evidence fails to show that the water . . . can not be discharged otherwise than to the injury of plaintiff. 'The extreme exception to the general rule' which was introduced in the Sanderson case does not control because, as already pointed out, the conditions as presented in the two cases are unlike. The undoubted tendency of later cases is to limit rather than extend the principle of that case. It follows, therefore, that the general rule must apply, and that the defendant must use its own property so as to avoid injury to the plaintiff." 238 Pa. at 93-95, 85 A. at 1106. *Also see Roaring Creek Water Company v. Anthracite Coal Company of Pittsburg*, 212 Pa. 115, 61 A. 811 (1905), a brief per curiam opinion sustaining the grant of a preliminary injunction in which it was shown that defendants were pumping impure water accumulated in its mine into a pure stream whereby the stream water became polluted when for "a trifling expense the mine water could be discharged into another water course where it would injure no one."

The salient facts of these cases, which appear to have impelled a result contrary to *Sanderson* were the purity of the stream into which mine water was discharged, the affirmative act of pumping the mine water and the balancing of the cost of alternative methods of disposal against the deleterious impact upon plaintiffs and the use of their land.

In *Pennsylvania R. R. v. Sagamore Coal Co.*, 281 Pa. 233, 126 A. 386 (1924), the Supreme Court was again faced with its decision in *Sanderson;* this time on an appeal from dismissal of a complaint in equity by the lower court in which it was charged that a *public* water supply from a *pure stream* was being polluted by acid mine water drainage into the stream from an operating mine. It is not clear whether the mine discharge was pumped into the stream or naturally flowed into it. In reversing the lower court, the Supreme Court said the case was controlled by one fact and a single equitable principle, ". . . the fact that the stream has been polluted, and the principle that this creates an enjoinable nuisance, if the public uses the water." It said this in the context of a "stream of pure water (one of the very few unpolluted ones in the section of the State where it is located) . . . impounded, primarily, for the purpose of furnishing uncontaminated water. . . ." It further stated:

"We have, therefore, a situation where the waters of a stream are devoted to public use. Does the Sanderson Case apply under these circumstances? That litigation did not involve the rights of the public to the waters of streams in any sense. What was affected by the pollution of the stream was the private concern of that plaintiff. The case was determined on the balancing of the 'necessities of a great public industry' and a 'mere personal inconvenience.'

. . .

"It could not be said that a landowner on a watercourse whose rights in the stream are only those of a riparian proprietor (and none other is shown in defendants), would have them enlarged to one of property in the use of the waters by the discovery or development of coal on his lands.

"Our conclusion is that defendants have no right of any kind to drain their mine waters into the stream considering the public use which is made of its waters and that their so doing constitutes a nuisance which must be restrained.

"We recognize, however, as evidently the court below also did, that the public has an indirect interest in the business of defendants, and hence, applying the principle that he who seeks equity must do equity, the decrees to be entered should require plaintiffs (other than the Commonwealth), so far as this can reasonably and legally be done, to afford defendants an opportunity to transport and dispose of the mine water of their respective mines in such a way as shall minimize the expense of so doing; and the decrees, after their entry, should be enforced in the same equitable spirit. In fairness to plaintiffs it should be stated that their counsel, in oral argument at the bar of the court, expressed the willingness of their clients to thus cooperate with defendants.

"The decrees of the court below dismissing plaintiffs' several bills of complaint are reversed, the bills are reinstated, and it is directed that the court below shall enter decrees, enjoining and restraining defendants, and each of them, from discharging, pumping or causing or permitting to flow or to be discharged, any drainage of mine water from their mines, and from the mines of each of them, into the waters of Indian Creek, or its tributaries, above the dam of the Mountain Water Supply Company, after the expiration of six months from the date of the entry of the decrees." 281 Pa. at 246-47, 250-51, 126 A. at 390, 392.

The salient facts of this case were the purity of the stream in question and its use as a supply of water for domestic consumption by a large segment of the public.

Apparently it was not considered as important or controlling, that the mine drainage may have flowed naturally into the stream.

Although not concerned with mine drainage from an operating mine or from a closed mine, the Commonwealth, as to this issue, also relies upon the case of *Commonwealth ex rel. Shumaker v. New York & Pennsylvania Company, Inc., supra,* discussed at some length under the Third Issue, *supra.* As to this issue, the Commonwealth asserts the case stands for the unqualified principle that corruption of the waterways when it affects the public use of a stream or menaces the public health, becomes a public nuisance which the Commonwealth may seek to abate in equity. In *Shumaker* the Court said:

"Corruption of water, when it affects the public use of a stream or menaces the public health, becomes a public nuisance which the commonwealth may suppress by criminal proceedings upon indictment for maintaining a public nuisance and upon conviction the court may in its sentence include an order requiring abatement of the nuisance: see Barclay v. Commonwealth, 25 Pa. 503 (1855). Also the Commonwealth may proceed in equity for an injunction requiring abatement of the nuisance: Pennsylvania R. R. et al. v. Sagamore Coal Co., 281 Pa. 233, 126 A. 386 (1924); Com. ex rel. v. Soboleski, 303 Pa. 53, 153 A. 898 (1931); Com. v. Kennedy, 240 Pa. 214, 87 A. 605 (1913); Com. ex rel. v. Emmers, 221 Pa. 298, 70 A. 762 (1908). When the Commonwealth so proceeds its right to relief is not restricted by any balancing of equities, nor by the rule of 'damnum absque injuria' as in Pa. Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886), nor by any question of possible prescriptive rights for no matter how long continued stream polluters can acquire no prescriptive or property right to pollute as against the Commonwealth: Pennsylvania R. R. Co. et al. v. Sagamore Coal Co., supra.

"It was upon this law, so established, that section 3 of Article I of the Pure Streams Act above quoted, was based. The legislature therefore stood on solid ground in declaring its public policy and what discharges were to be considered as public nuisances in contradistinction to private nuisance, not merely for the purposes of that Act, but generally. In Commonwealth v. Dietz, 285 Pa. 511, 519, 132 A. 572 (1926), we said, 'When the legislature validly pronounces a particular state of affairs to be a nuisance prejudicial to the public health, it is as much so as if the proscribed situation had been considered a "nuisance . . . at common law," and "may be prohibited by the same remedies."' To this we may well add it is so, *a fortiori*, where the proscribed conditions were already recognized as a nuisance at common law." 367 Pa. at 48-9, 79 A. 2d at 444.

As previously noted, however, this statement was made in the context of the discharge of industrial wastes —as then defined by the statute—into a pure stream by the operator of a pulp and paper mill and at a time in the legislative history of The Clean Streams Law which excluded mine drainage from not only regulatory control but from the definition of industrial waste. Our analysis of this case as it pertains to common law public nuisance is simply that if a nuisance at common law can be found to exist, Sections 3 and 701 of the Act considered together preserve the right in the Commonwealth to abate it through equity.

In our opinion, the decisions that we have here reviewed and their supporting authority justify our view that the present case is one of first impressions as to whether it can be judicially declared today under the facts of this case that a public nuisance at common law exists for which B & T has sole or partial responsibility for its abatement.

Of the one or more common facts found in the reviewed cases leading the court to conclude that a common law public or private nuisance existed as a matter of law, none are present in the instant case. The waters of the Commonwealth here in question are and for a long period of time have been polluted by sewage and acid mine drainage from closed or "abandoned" mines. Except for some developing recreational uses there is no evidence that these waters in their polluted state are used for public purposes. Nor do we have in this case facts supporting concepts of negligence, foreseeability or unlawful conduct, being elements of seemingly persuasive force in some of the cases. Similarly, factors of a present activity on the part of the owner or user of the land or of a course of conduct directly producing the deleterious result are absent in this case.

What we do have is an artificial condition of the subsurface of the land as a result of the mining activity of B & T and its predecessors who at all times conducted their mining operations and the ultimate closure of the mine in a lawful manner and consistent with statutory law and regulations then in effect. We further have the forces of nature at work which forces—given the location of the closed mine and the volume of water entering it by percolation and subterranean flow—produced a breakout which resulted in further pollution of a polluted stream from the acid mine drainage for[illegible]ut of the mine.

For better than one hundred [illegible] the State has chosen to regulate mining and there is no credible evidence in this case that Mine No. 15 was not operated and eventually closed consistent with statutory law, regulation or licenses issued pursuant thereto. With respect to clean stream legislation, until 1945 the Legislature accorded exemption to mine drainage from operating mines from declaration

of unlawfulness or regulatory control into the waters of the Commonwealth, clean or otherwise polluted; and it was not until 1965 that it chose to exercise regulatory control over such drainage as to all waters of the Commonwealth and declare violation to be a statutory nuisance. And it was not until 1970 that it clearly empowered the government to place responsibility for post-mining drainage upon an operator. During this period, as disclosed in the legislative history, *supra*, the Legislature recognized and placed upon the government responsibility for abatement of mine drainage from "abandoned" mines and provided funds for such abatement however adequate or inadequate to the task such funds might be.

Considering the legislative history, the lawful operation and closure of Mine No. 15 at all times and the other salient facts of this case, we cannot today declare—solely for the reason that B & T and its predecessors created a subsurface artificial condition by reason of mining—that a breakout of mine water through the forces of nature at work adjunctive to said artificial condition, constitutes a public nuisance for which B & T is responsible today. The Commonwealth, through the Legislature, has recognized that the pollution or further pollution of the waters of the Commonwealth by mine drainage is deleterious to the health and welfare of the citizens of Pennsylvania. As to the future it has empowered the government to place responsibility upon operators for post-mining discharge. As to the past, it has declared that the government shall be responsible for such discharge for closed or abandoned mines.

Accordingly, we conclude under the facts of this case that B & T cannot be held responsible for abatement of the discharge from closed Mine No. 15 on the theory of common law public nuisance.

For the foregoing reasons we make the following

Conclusions of Law

1. Barnes & Tucker Company, as the holder of time extended permit No. 564M5 or as the holder of permit No. 567M035 did not assume responsibility by reason of the provisions of The Clean Streams Law or regulation promulgated thereunder then in effect for mine water discharge from Mine No. 15 after cessation of mining.

2. The mine water discharge emanating from Mine No. 15 after cessation of mining did not become the responsibility of Barnes & Tucker Company to abate its polluting qualities under Section 316 of The Clean Streams Law as then in effect, as the owner or as one having proprietary interests in said mine.

3. The mine water discharge emanating from Mine No. 15 after cessation of mining does not constitute a public nuisance under Section 3 of The Clean Streams Law as then in effect for which Barnes & Tucker Company is presently responsible and which it must abate of its polluting qualities.

4. The mine water discharge emanating from Mine No. 15 after cessation of mining does not constitute a common law nuisance for which Barnes & Tucker Company is responsible and which it must abate of its polluting qualities.

Decree Nisi

Now, April 16, 1973, in recognition of the need for further proceedings to fix money damages to be awarded on any judgment to be entered consistent with the foregoing opinion and this decree nisi; of the need for and public interest in continuation of the preliminary injunction heretofore issued by order dated April 13, 1971, pend-

ing final disposition of this case; and of the likelihood of appeal because of the important and novel legal issues involved, it is hereby ORDERED as follows:

1. If within thirty (30) days of the date hereof no exceptions are filed by either party to rulings on objections to evidence, to findings of fact or conclusions of law, or to refusals to find requested findings of fact or conclusions of law, the hearing judge shall promptly conduct a hearing to determine the amount of money damages to be awarded to Barnes & Tucker Company consistent with prior order of Court dated April 13, 1971, to be followed by further order of Court directing entry of judgment which will dissolve the preliminary injunction heretofore issued: said preliminary injunction to remain in full force and effect until such further order of Court.

2. If within said thirty (30) days exceptions as aforesaid are filed by either party, said preliminary injunction shall remain in full force and effect until such exceptions are ruled upon by the Court and thereafter until further proceedings as aforesaid are conducted by the hearing judge, if necessary, and further order of Court entering a final judgment perfecting right of appeal in the party against which judgment is entered.*

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* The foregoing opinion was prepared before and was being processed to be the decision of the Court in this case at the time the Supreme Court of Pennsylvania handed down its opinion in *Commonwealth v. Harmar Coal Company* (No. 89 May Term 1972) and *Commonwealth v. Pittsburgh Coal Company* (No. 90 May Term 1972) reversing this Court in those cases. We have carefully reviewed the opinion of the Supreme Court in those cases and, while certain observations and discussion contained therein might ideally suggest some revision of discussion contained in the above opinion, we are of the opinion that the decision in those cases is not controlling of this case. To avoid further delay we, therefore, hand down our opinion in this case without revision.

CONCURRING OPINION BY JUDGE MENCER:

I concur in the result reached because, in the words of President Judge BOWMAN, "factors of a present activity on the part of the owner or user of the land or of a course of conduct directly producing the deleterious result are absent in this case." The absence of these factors is the distinguishing factual feature between this case and the cases of *Pittsburgh Coal Company v. Sanitary Water Board*, 4 Pa. Commonwealth Ct. 407, 286 A. 2d 459 (1972), and *Harmar Coal Co. v. Sanitary Water Board*, 4 Pa. Commonwealth Ct. 435, 285 A. 2d 898 (1972). My dissenting opinions in those two cases contended that there were violations of the 1965 amendments to The Clean Streams Law, enacted by the Act of August 23, 1965, P. L. 372, because there was a discharge into the streams as a result of present activity on the part of the owner or user of the land or a course of conduct (pumping) directly producing the discharge and deleterious results.

I am of the opinion that the 1970 amendments to Section 316 of The Clean Streams Law, Act of July 31, 1970, P. L. 653, § 12, 35 P. S. § 691.316, could have been applied in this case but fully agree with the opinion writer that "[t]here is no evidence in this record that the Sanitary Water Board or the Department issued any order at any time against B & T as a 'landowner' under the provisions of this section."

Finally, the confusion as to whether, during the critical periods of time in this case, B & T was operating under permit No. 567M035 or extensions of permit No. 564M005, coupled with the cessation of all operations and the closing of Mine No. 15 by late July 1969, nearly one year prior to the first breakout, leads me to believe that the result here is legally correct.

COMMONWEALTH, APPELLANT,

v.

BARNES & TUCKER COMPANY.

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Argued November 16, 1973. Before JONES, C. J., EAGEN, O'BRIEN, ROBERTS, POMEROY and NIX, JJ.

Appeal, No. 20, May T., 1974, from decree of Commonwealth Court, No. 896A Tr. Dkt. 1970. Decree of Commonwealth Court reversed and matter remanded; reargument refused May 31, 1974.

K. W. James Rochow, Assistant Attorney General, with him *Michael S. Alushin*, Assistant Attorney General, for Commonwealth, appellant.

Cloyd R. Mellott, with him *C. Arthur Wilson, Jr., John R. Kenrick, Frank A. Sinon, Eckert, Seamans, Cherin & Mellott*, and *Rhoads, Sinon & Reader*, for appellee.

OPINION BY MR. CHIEF JUSTICE JONES, March 25, 1974:

Appellee, Barnes & Tucker Company, engaged in active deep mining operations at Lancashire Mine No. 15 in Cambria County from 1939 until July 1969, at which time the mine was closed and sealed. Following closure, Mine No. 15 began to inundate and in June and July of 1970 substantial discharges of acid mine drainage were discovered at two different locations. Without detailing the factual posture which will be discussed *infra*, the events which precipitated this appeal are as follows.[1] The Department of Environmental Resources filed a complaint in equity in the Commonwealth Court on August 7, 1970, seeking preliminary and permanent mandatory injunctions

1. For a more detailed discussion of the factual and procedural posture of this case, see the opinion of the Commonwealth Court at 9 Pa. Commonwealth Ct. 1, 303 A. 2d 544 (1973).

requiring Barnes & Tucker to treat the efflux from Mine No. 15. After attempts by the Commonwealth and Barnes & Tucker to resolve their differences inter se had failed, a preliminary injunction hearing was begun on March 5, 1971, and was completed on March 25, 1971. In the interim, the Commonwealth had filed an amended complaint on March 17, 1971, which consisted of four counts. Three of the counts were based on The Clean Streams Law,[2] and the remaining count was based on a common law nuisance theory.

A preliminary injunction was issued by the Commonwealth Court on April 13, 1971, requiring the continuation of treatment facilities until final determination of the action on the merits with the parties sharing the costs on an equal basis. 1 Pa. Commonwealth Ct. 552 (1971). On the merits of granting permanent injunctive relief, however, the Commonwealth Court found that Barnes & Tucker was not liable for the abatement of the discharge from Mine No. 15 under any of the Commonwealth's four theories. *Commonwealth v. Barnes & Tucker Co.*, 9 Pa. Commonwealth Ct. 1, 303 A. 2d 544 (1973). From that decree the Commonwealth's appeal followed.

This Appeal presents significant questions concerning the power of the Department of Environmental Resources [3] to enjoin acid mine drainage from abandoned mines. In some respects, this is a case of first impression in this Commonwealth, requiring an analysis of The Clean Streams Law and the law of public nuisance. Due to the complexity of the legal questions involved, a preliminary in-

2. Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. § 691.1 *et seq.* *See* Section I, *infra*.

3. Prior to the Act of December 3, 1970, P. L. 834, § 30, 71 P. S. § 510-103, the Sanitary Water Board was responsible for mine drainage. By this Act, however, the Sanitary Water Board was abolished and its functions were taken over by the Department of Environmental Resources.

vestigation of the procedural and factual posture of this case juxtaposed with a discussion of the evolution of Clean Streams legislation in the Commonwealth we deem useful.

I.

The Clean Streams Law was first enacted by the Act of June 22, 1937, P. L. 1987. Prior to its passage, the pertinent legislation was the Purity of Waters Act of April 22, 1905, P. L. 260, which regulated the discharge of sewage into the waters of the Commonwealth. It was specifically provided, however, that this act was not to apply to "waters pumped or flowing from coal mines. . . ." Likewise, the Act of June 14, 1923, P. L. 793, which authorized the Department of Health to promulgate orders and regulations for the prevention of pollution, similarly exempted coal mine discharges.

The Clean Streams Law, as enacted in 1937, took a middle ground with reference to mine drainage, as it provided that: "The provisions of this article shall not apply to acid mine drainage and silt from coal mines until such time as, in the opinion of the Sanitary Water Board, practical means for the removal of the polluting properties shall become known." 35 P. S. § 691.310.

The Act of May 8, 1945, P. L. 435, significantly amended The Clean Streams Law in several respects. Section 2, the definitional section, redefined "establishment" to include coal mines and broadened the definition of "pollution" to include discharges from coal mines. Section 309, which imposed penalties for discharge of industrial waste into the waters of the Commonwealth, was also amended to cover acid mine drainage. Section 310 was also amended, further bringing the treatment of acid mine drainage into parity with other sources of pollution. By these amendments Section 310 read, *inter alia:*

"Except as hereinafter provided, the provisions of this article shall not apply to acid mine drainage from coal mines until such time as, in the opinion of the Sanitary Water Board, practical means for the removal of the polluting properties of such drainage shall become known.

"It shall be unlawful and a nuisance to discharge, or to permit the discharge, of acid mine drainage (1) into 'clean waters' of the Commonwealth which are being devoted or put to public use at the time of such discharge; or (2) into 'clean waters' of the Commonwealth, unless the Commonwealth, after the Sanitary Water Board has approved plans of drainage pursuant to section three hundred thirteen hereof, and has set a reasonable time not to exceed one year within which such pipes, conduits, drains, tunnels or pumps as may be necessary to receive such acid mine drainage at the point or points where such acid mine drainage is delivered, as provided in this section, shall be constructed and put into operation by the Commonwealth, has failed to construct and put into operation the same within such time: Provided, That nothing in this amendatory act shall be construed to limit or affect the provisions of section seven hundred one of the act to which it is an amendment."

A new section 313 was added by the 1945 amendments to read in part as follows: "Before any existing or new coal mine may be opened or reopened, and before any existing coal mine may be continued in operation, a plan of the proposed drainage and disposal of industrial wastes, and acid mine drainage of such mine, shall be submitted to the Sanitary Water Board, and it shall be unlawful to open or reopen any such mine, or to continue the operation of any mine, or to change or alter any already approved plan of drainage and disposal of industrial wastes, and acid mine drainage from such mine, unless

and until the board, after consultation with the Department of Mines has approved such plan or change of plan. . . ."

In 1965 The Clean Streams Law was again substantially altered by the Act of August 23, 1965, P. L. 372. A new section was added which detailed legislative findings and declarations of policy:

"Section 4. Findings and Declarations of Policy.—It is hereby determined by the General Assembly of Pennsylvania and declared as a matter of legislative findings that:

"(1) The Clean Streams Law as presently written has failed to prevent an increase in the miles of polluted water in Pennsylvania.

"(2) The present Clean Streams Law contains special provisions for mine drainage that discriminate against the public interest.

"(3) Mine drainage is the major cause of stream pollution in Pennsylvania and is doing immense damage to the waters of the Commonwealth.

"(4) Pennsylvania, having more miles of water polluted by mine drainage than any state in the nation, has an intolerable situation which seriously jeopardizes the economic future of the Commonwealth.

"(5) Clean, unpolluted streams are absolutely essential if Pennsylvania is to attract new manufacturing industries and to develop Pennsylvania's full share of the tourist industry, and

"(6) Clean, unpolluted water is absolutely essential if Pennsylvanians are to have adequate out of door recreational facilities in the decades ahead.

"The General Assembly of Pennsylvania therefore declares it to be the policy of the Commonwealth of Pennsylvania that:

"(1) It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted, and

"(2) The prevention and elimination of water pollution is recognized as being directly related to the economic future of the Commonwealth." The definitional section was amended to include mine drainage within the definition of "industrial waste," 35 P. S. § 691.1, thus bringing acid mine drainage within the prohibition of Section 307, which remained essentially unchanged since originally enacted in 1937 and which provided in part: "No person shall hereafter erect, construct or open, or reopen or operate, any establishment which, in its operation, results in the discharge of industrial wastes which would flow or be discharged into any of the waters of the Commonwealth and thereby cause a pollution of the same, unless such person shall first provide proper and adequate treatment works for the treatment of such industrial wastes, approved by the board, so that if and when flowing or discharged into the waters of the Commonwealth the effluent thereof shall not be inimical or injurious to the public health or to animal or aquatic life, or prevent the use of water for domestic, industrial or recreational purposes. . . ."

Sections 310, 311, 312 and 313 were repealed by the 1965 Act, but an important new Section 315 was added which provided:

"(a) Before any coal mine is opened, reopened, or continued in operation, an application for a permit approving the proposed drainage and disposal of industrial

wastes shall be submitted to the Sanitary Water Board. The application shall contain complete drainage plans including any restoration measures that will be taken after operations have ceased and such other information as the board by regulation shall require.

"(b) It shall be unlawful to open, reopen, or continue in operation any coal mine, or to change or alter any approved plan of drainage and disposal of industrial wastes, unless and until the board, after consultation of the Department of Mines and Mineral Industries, has issued a permit approving the plan or change of plan. A permit shall not be issued if the board shall be of the opinion that the discharge from the mine would be or become inimical or injurious to the public health, animal or aquatic life, or to the use of the water for domestic or industrial consumption or recreation. In issuing a permit the board may impose such conditions as are necessary to protect the waters of the Commonwealth. The permittee shall comply with such permit conditions and with the rules and regulations of the board.

"(c) The board may modify, suspend or revoke any permit issued pursuant to this section. Such action may be taken if the board finds that a discharge from the mine is causing or is likely to cause pollution to waters of the Commonwealth or if it finds that the operator is in violation of any provision of this act or any rule or regulation of the Sanitary Water Board. An order of the board modifying, revoking or suspending a permit shall take effect upon notice from the board, unless the order specifies otherwise. Any party aggrieved by such order shall be given the opportunity to appear before the board at a hearing at which the board shall reconsider its order and issue an adjudication, from which the aggrieved party may appeal in the manner provided by the 'Administrative

Agency Law,' act of June 4, 1945 (P. L. 1388), as amended. The right of the board to suspend or revoke a permit is in addition to any penalty which may be imposed pursuant to this act.

"(d) Any permit approving the drainage and disposal of industrial wastes from a coal mine and issued by the board prior to the effective date of this act shall be deemed to be a permit issued pursuant to this section. The permit shall be valid for one year from the effective date of this act or for such additional period as the board might allow. Nothing herein shall limit the board's power to modify, suspend, or revoke any such permit under the provisions of subsection (c) of this section."

The most recent amendments to The Clean Streams Law were effected by the Act of July 31, 1970, P. L. 653, and again significantly altered the prior law. It is clear that the 1970 amendments extended the Board's control over mining to include regulation of all operations and discharges. Section 307 now reads in part: "No person . . . shall discharge or permit the discharge of industrial wastes in any manner . . . into the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the board or such person . . . has first obtained a permit from the department. . . ." To the same end, Section 315(a) now reads in part: "No person . . . shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the board or such person . . . has first obtained a permit from the department."

Section 316, which had been added in 1965 to require landowners and occupiers to allow access to the land so that appropriate corrective measures could be taken, was

significantly changed. That section now provides a separate basis for the imposition of liability for pollution "from a condition which exists on the land."

The apposition and effect of The Clean Streams Law, and its various amendments, to this litigation are crucial to the resolution of at least three issues raised and will be discussed at length *infra*.

II.

Mine No. 15 is a bituminous deep coal mine located in the B seam of coal in the Barnesboro Basin area of Cambria and Indiana Counties near the headwaters of the West Branch of the Susquehanna River. The mine contains approximately 6,600 acres, most of which is located in the lowest section of the basin. The mine was first opened in 1915 and following a series of different operators, Barnes & Tucker took over operation of the mine in 1939 when it acquired the assets of its subsidiary, Barnes Coal Company, upon that company's dissolution. During the operation of the mine by Barnes & Tucker, four different certificates or permits were issued by the Sanitary Water Board for acid mine discharge in connection with the operation of Mine No. 15.

The first certificate of approval of mine drainage, Certificate No. 892, was issued by the Sanitary Water Board on July 22, 1948, pursuant to power conferred upon the Board in the 1945 amendments. The drainage plan provided for discharge into Little Brown's Run, which empties into Brown's Run, and eventually into the West Branch of the Susquehanna River.

On March 25, 1960, Permit No. 14,326 (sometimes referred to as Permit No. 19124-M) was issued in repsonse to an application of Barnes & Tucker. The plan of drainage approved therein provided for the discharge to be

pumped through a borehole into Crooked Run, a tributary of Elk Creek, which flows into the North Branch of Black-Lick Creek which, in turn, flows into the Conemaugh River. These waters are in the Allegheny watershed.

In 1964 Barnes & Tucker wished to open a new mine in the Barnesboro Basin to conduct mining operations in both the B and D seams of coal (Mine No. 24). It was thus necessary to obtain an additional permit to cover these proposed operations. An application was made to cover a proposed plan of drainage for all of Barnes & Tucker's mining operations in both the B and D seams. On December 21, 1964, Permit No. 564M5 was issued approving the proposed plan of drainage, which for Mine No. 15 was the same as it had been under Permit No. 14,326.

As previously stated, the 1965 amendments significantly expanded the scope of The Clean Streams Law by proscribing the discharge of acid mine drainage into *all* waters of the Commonwealth and not just "clean" waters. The 1965 amendments became effective January 1, 1966. Prior permit holders were treated in Section 315(d) of the Act, which provided: "Any permit approving the drainage and disposal of industrial wastes from a coal mine and issued by the board prior to the effective date of this act shall be deemed to be a permit issued pursuant to this section. The permit shall be valid for one year from the effective date of this act or for such additional period as the board might allow. Nothing herein shall limit the board's power to modify, suspend, or revoke any such permit under the provisions of Subsection (c) of this section." Pursuant to this section, Barnes & Tucker applied for and was granted three extensions of time to operate under its mine drainage permit No. 564M5, subject to certain conditions. The last extension was effective until

May 31, 1969. During the period of these extensions, however, Barnes & Tucker filed an application for a new mine drainage permit to cover both Mines Nos. 15 and 24 on a form prescribed for post-1965 amendment permits. This application was filed on October 17, 1967, and on March 22, 1968, Permit No. 567M035 was issued. The Commonwealth Court made no finding with regard to which permit or permits Mine No. 15 was being operated under during the period from March 1968 until May 1969.[4] In light of Section 315(d), even a time-extended permit originally issued prior to the effective date of the 1965 amendments was to be treated as if issued pursuant to those amendments. Furthermore, under both permits the plan of drainage for Mine No. 15 was the same. Consequently, the only legal relevance in a determination of the governing drainage permit would be the effect of the conditions imposed upon the issuance of Permit No. 567M035 and Permit No. 564M5 and the extensions thereto. An analysis of the Board's power to impose conditions upon permits and the effect of those conditions upon the issues presented in this case will be pursued *infra*.

III.

The Commonwealth Court framed the legal issues involved in this case as follows:

"1. Under the provisions of The Clean Streams Law then in effect, did B & T [Barnes & Tucker] as a holder of time extended permit No. 564M5 or permit No. 567M035 (the 1965 amendment permit) assume responsibility for mine water discharge from Mine No. 15 after cessation of mining and thereby also become responsible for its treatment to meet minimum water quality standards established by the Commonwealth?

4. After the issuance of Permit No. 567M035, two additional extensions to Permit No. 564M5 were granted.

"2. Did the mine water discharge emanating from Mine No. 15 impose any responsibility upon B & T for abatement of the polluting qualities of the discharge under Section 316 of The Clean Streams Law as then in effect?

"3. Did the mine water discharge emanating from Mine No. 15 constitute a public nuisance under Section 3 of The Clean Streams Law as then in effect for which B & T is responsible and which it must abate?

"4. Did the mine water discharge emanating from Mine No. 15 constitute a common law public nuisance for which B & T is responsible and which it must abate?" Since the Commonwealth Court resolved all four of these questions in favor of Barnes & Tucker, a discussion of the constitutional question of imposing responsibility on Barnes & Tucker and the issues of estoppel, laches, and waiver against the Commonwealth was obviated. The findings of fact by the court below are supported by the record and will not be disturbed on appeal. In the application of the law to these facts, however, we are not in total accord with the Commonwealth Court, and, accordingly, we reverse. This disposition will therefore necessitate not only our review of those questions decided below, but also a discussion of the questions of constitutionality, waiver, estoppel, and laches.

The Commonwealth first contends that Section 315 of the *1965* Clean Streams Law[5] imposes responsibility upon Barnes & Tucker to abate or treat the discharge from Mine No. 15. This contention is trifurcate: (1) Section 315 expressly imposed such responsibility; (2) the regula-

5. Since a claim under Section 315 of the *1970* law was not raised by the Commonwealth, we will not raise it sua sponte.

tions and conditions attached to the drainage permit imposed such responsibility; or (3) but for Barnes & Tucker's deception the Board would have imposed such responsibility by means of regulation or condition upon the permit.

As earlier discussed, the 1965 amendments to The Clean Streams Law reflected a significant change in legislative policy towards polluting emissions from coal mines. The principal effect of the 1965 amendments was to extend the coverage of the permit provisions by eliminating any distinction between discharges into clean and unclean streams. Despite the expression of legislative policy that the objective of the 1965 amendments was "not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted," 35 P. S. § 691.4, the 1965 amendments did not provide a blanket interdiction of polluting discharges from coal mines. Section 315 appertained to *opening, reopening,* or *operating* a coal mine.[6] Likewise, Section 307 spoke of the discharge of industrial wastes resulting from the *operation* of an establishment. Although the 1965 amendments required a drainage permit for discharges into "unclean" waters for the first time, Section 306 (repealed in 1970), which broadly proscribed the discharge of industrial waste into the waters of the Commonwealth, was retained after the 1965 amendments, and

6. Section 315(a) dealt with the requirement for a permit before "any coal mine is opened, reopened, or continued in operation." Section 315(b) interdicts opening, reopening, or operating a coal mine without or in derogation of a drainage permit. This subsection also provides the authority for the Board to promulgate rules and regulations and to impose conditions upon the grant of a drainage permit. Section 315(c) deals with modification, suspension, and revocation of drainage permits, and Section 315(d) deals with pre-1965 amendment permits.

was limited to the protection of *clean* waters. The discharge in this case is admittedly not into clean waters. We therefore find, as did the Commonwealth Court, that The Clean Streams Law of 1965, and in particular Section 315, did not expressly impose responsibility upon Barnes & Tucker to abate or treat post-mining discharges.[7]

Although The Clean Streams Law did not expressly speak to post-mining discharges as of 1965, it did empower the Board to promulgate rules and regulations, to attach conditions to permits, and to require permit applications to contain "complete drainage plans including any restoration measures that will be taken after operations have ceased. . . ." This grant of administrative power, however, must be viewed in the context of the enabling statutory section. In this case, that section deals with drainage permits. Accordingly, the *only* sanctions provided by Section 315 of the 1965 law for the violation of a rule or regulation of the Board, or the breach of a permit condition, are modification, suspension, or revocation of the permit as provided in Section 315(c).[8] We are not called upon to rule on the propriety of the Board's revocation of Permit No. 567M035 because of post-mining discharges from Mine No. 15.[9] Nor because of the limited sanctions

7. This determination is not influenced by the fact that the Legislature in 1965 also enacted the Act of December 15, 1965, P. L. 1075, 35 P. S. § 760.1 *et seq.*, which was to alleviate pollution of streams from abandoned coal mines by granting certain duties and powers to the Department of Mines and Mineral Industries.

8. To the contrary, Section 315 of the 1970 Clean Streams Law and Section 307, both after and prior to the 1970 amendments, provided for the abatement of the discharge through Section 601, 35 P. S. § 691.601.

9. In this regard we note that the wisdom of the decisions in *Sanitary Water Board v. Subeam Coal Corp.*, 77 Dauph. 264 (1961), and 47 Pa. D. & C. 2d 378 (Dauphin Co. 1969), cited by Barnes & Tucker is not now before us and that those decisions are inapposite to the disposition of this appeal.

provided in Section 315, which do not include injunctive relief, need we review the Administrative Rules and Regulations of the Board on the conditions attached to either Permit No. 564M5 or Permit No. 567M035, since such review could have no bearing on this action for a mandatory injunction. The relief sought by the Commonwealth cannot, therefore, be premised on this theory.

The second count of the Commonwealth's amended complaint asserts responsibility upon Barnes & Tucker for the post-mining discharge by reason of Section 316 of the 1970 Clean Streams Law. This section provides in part:

"Whenever the Sanitary Water Board finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the board may order the landowner or occupier to correct the condition in a manner satisfactory to the board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, 'landowner' includes any person holding title to or having a propriety interest in either surface or subsurface rights.

"For the purpose of collecting or recovering the expense involved in correcting the condition, the board may assess the amount due in the same manner as civil penalties are asessed under the provisions of section 605 of the act: Provided, however, That if the board finds that the condition causing pollution or a danger of pollution resulted from mining operations conducted prior to January 1, 1966, or, if subsequent to January 1, 1966, under circumstances which did not require a permit from the Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P. L. 372), then the amount assessed shall be

limited to the increase in the value of the property as a result of the correction of the condition."

The remedies provided in Section 316 are statutorily created, and as such are to be strictly construed. In the present case, there was no administrative order. Consequently, even if the facts of this case would warrant relief under Section 316, such relief would not be obtainable through an original equity action in the Commonwealth Court.[10] The Commonwealth's reliance on that section is therefore inapt.

The third and fourth bases upon which the Commonwealth claims relief should be granted are the doctrines of statutory and common law public nuisances. We find that relief may be granted under *either* of these theories. In order to correct what we believe to be a misinterpretation of The Clean Streams Law and the law of public nuisance, we think it advisable to discuss *both* theories.

Section 3 of The Clean Streams Law has provided since July 31, 1970, that: "The discharge of sewage or industrial waste or any substance into the waters of this Commonwealth, which causes or contributes to pollution as herein defined or creates a danger of such pollution is hereby declared not to be a reasonable or natural use of such waters, to be against public policy and to be a public nuisance." Section 601 of the 1970 Clean Streams Law provides for the abatement of nuisances. That section provides in part: "(a) Any activity or condition declared by this act to be a nuisance, shall be abatable in the manner provided by law or equity for the abatement of public nuisances."

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10. *See* Section 610 of The Clean Streams Law, 35 P. S. § 691.610, regarding enforcement orders, and Section 1917-A of The Administrative Code, 71 P. S. § 510-17, regarding the powers and duties of the Department of Environmental Resources to abate or remove nuisances.

The Commonwealth's amended complaint contained reference to both of these sections and was filed almost eight months after the effective date of the 1970 amendments. Since the Commonwealth's prayer for relief—abatement of a nuisance—is prospective, the 1970 amendments are clearly applicable. However, although the Commonwealth Court set forth Section 3 of the 1970 law in its opinion, the Court did not appear to consider this section in its disposition. To the contrary, the Court spoke of the legislative history *prior* to 1970, the failure of the Commonwealth to assert that the waters here involved were "clean waters," and Section 310 of The Clean Streams Law. Although Section 310 of The Clean Streams Law declared the discharge of acid mine drainage into "clean waters" to be a public nuisance, this section was repealed in 1965 and would have no bearing on the present case even if the receiving stream were unpolluted. Section 3 is very clear and not difficult of application. The record fully supports a finding that the discharge causes or *contributes* to the pollution of the receiving stream, or at the least *creates a danger* of such pollution. We are therefore of the opinion that Section 3 *on its face* does provide the Commonwealth a remedy.

Barnes & Tucker argues that the limited applicability of Section 315(a) of the 1970 law to only those post-mining discharges where mining operations have occurred subsequent to January 1, 1966, under conditions requiring a permit pursuant to Section 315(b) of the 1965 law, should likewise obtain to Section 3. Without adjudging the merits of this contention, we believe that the result we reach would be unaffected by such a limitation. Whether Barnes & Tucker was operating Mine No. 15 prior to closure under either Permit No. 564M5 or Permit No. 567M035, it was operated under circumstances requiring

a permit under Section 315(b) of the 1965 law for purposes of the limitation in Section 315(a) of the 1970 law. We reach this conclusion without making a finding as to which permit or permits Barnes & Tucker operated under subsequent to January 1, 1966, because Permit No. 567M035 *was issued* pursuant to Section 315(b) of the 1965 law and Permit No. 564M5, although issued prior to the effective date of the 1965 law, is, under Section 315(d) of the 1965 law, *deemed to be issued* pursuant to this section, *i.e.*, pursuant to Section 315(b).

Our holding in regard to the Commonwealth's claim based on Section 3 of the 1970 Clean Streams Law is not inconsistent with our ruling on the first claim based on Section 315. In ruling upon that contention we restricted our discussion to the 1965 law because the Commonwealth had so based its claim. The 1970 law, however, significantly altered Section 315 and would, on its face, provide a basis of relief. That section now provides in pertinent part: "No person . . . shall . . . allow a discharge from a mine . . . unless such . . . discharge is authorized by the rules and regulations of the board or such person . . . has first obtained a permit from the department. . . . A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1, 1966, under circumstances requiring a permit from the Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P. L. 372). The . . . allowing of any discharge without a permit or contrary to the rules and regulations of the board, is hereby declared to be a nuisance."

The Commonwealth's fourth basis for relief is under the theory of common law public nuisance. Although ordinarily we would not discuss an alternative basis of

liability, having already found liability to exist under one theory, we feel that the Commonwealth Court's misconstruction of this evasive area of the law compels comment by this Court.

Dean Prosser has aptly stated that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'." W. Prosser, *Law of Torts*, § 87 (3d Ed. 1964). Aside from the conceptual problem in recognizing that nuisance involves an area of tort liability and not a type of tortious conduct, much of the confusion surrounding nuisance law has resulted from the divergent interests protected, which respectively give rise to liability for private and public nuisance. Much of the confusion enshrouding the field of nuisance law in this Commonwealth with regard to coal mines has emanated from this Court's opinion in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 A. 453 (1886). Although never expressly overruled, *Sanderson* has consistently been distinguished and limited to its facts. *See, e.g., McCune v. Pittsburgh & Baltimore Coal Co.*, 238 Pa. 83, 85 A. 1102 (1913); *Sullivan v. Jones & Laughlin Steel Co.*, 208 Pa. 540, 57 A. 1065 (1904) (The *Sanderson* doctrine "has never been and never ought to be extended beyond the limitations put upon it by its own facts." *Id.* at 549, 57 A. at 1068); *Hindson v. Markle*, 171 Pa. 138, 33 A. 74 (1895). *Sanderson* dealt with private nuisance and is therefore inapposite to the present case. In any event, we find that even with regard to the facts of *Sanderson*, the legal doctrine enunciated in that case is no longer viable.[11]

11. One commentator has put the *Sanderson* case in a class with the case of *Noonan v. Pardee*, 200 Pa. 474, 50 A. 255 (1901), a case in which this Court held that the statute of limitations for a cause of action for the subsidence of the surface caused by the mining of a coal vein ran from the date of the removal of the coal and not from the date of the subsidence. That commentator felt that *Noonan* "is worthy only of a place beside the notorious Sanderson

Although the Commonwealth Court recognized that *Sanderson* was a private nuisance case and that its doctrine has been severely limited, it nevertheless seemed to rely on that case. Furthermore, the Commonwealth Court weakly distinguished the only two public nuisance cases it discussed. We find these two cases, *Pennsylvania R. R. v. Sagamore Coal Co.*, 281 Pa. 233, 126 A. 386 (1924), and *Commonwealth ex rel. Shumaker v. New York & Pennsylvania Co., Inc.*, 367 Pa. 40, 79 A. 2d 439 (1951), to be pertinent to this case and to support the Commonwealth's theory.

Sagamore involved an appeal from the dismissal of a complaint in equity which sought to prevent the discharge of acid mine drainage into Indian Creek, in Fayette County. In *Sagamore*, as in the present case, discussion both on oral argument and in the exhaustive briefs took a wide range. This Court, however, succinctly limited the area of relevant inquiry in *Sagamore*: "the controversy . . . is controlled by one fact and a single equitable principle: the fact that the stream has been polluted, and the principle that this creates an enjoinable nuisance, if the public uses the water." 281 Pa. at 238, 126 A. at 387. We find this an accurate precis of public nuisance law and apposite to the present case.

The Commonwealth Court attempted to distinguish *Sagamore* on the basis that that case involved a pure stream used as a supply of water for domestic consumption for a large segment of the public. Those factors were important there to establish a public use of the water. In the present case the Commonwealth Court found that the only public use of these waters was a developing recreational use. We need not decide whether such a use

11. (Cont'd.)
case . . . in which, as was said by one of the greatest lawyers this state ever produced, the court held a pump to be a natural watercourse." 12 P. S. § 31, n. 126 at 74 (1953).

is sufficient in itself upon which to base injunctive relief, since we believe the public has a sufficient interest in clean streams alone regardless of any specific use thereof. Toward this end we are mindful of article I, Section 27, of the Pennsylvania Constitution, which provides: "Section 27. Natural Resources and the Public Estate. The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." As this Court recently stated in *Commonwealth v. Harmar Coal Co.*, 452 Pa. 77, 94, 306 A. 2d 308, 317 (1973): "There cannot be any doubt that an overriding public interest in acid mine drainage control does exist."

The Commonwealth Court also attempted to distinguish *Commonwealth ex rel. Shumaker v. New York & Pennsylvania Co., Inc.*, 367 Pa. 40, 79 A. 2d 439 (1951), wherein this Court held that corruption of water which affects the public use of a stream or menaces the public health becomes a public nuisance which the Commonwealth may seek to abate. *Shumaker* involved the discharge of twenty million gallons of polluted water from a pulp and paper mill into the waters of the Commonwealth. The bill in equity in *Shumaker* was based on theories of statutory and common law public nuisance, both of which this Court found to be proper jurisdictional subjects of the court below. The Commonwealth Court found the statements of law contained in *Shumaker* to be inapplicable presently because they were "made in the context of the discharge of industrial wastes—as then defined by the statute— . . . by the operator of a pulp and paper mill and at a time in the legislative history of

The Clean Streams Law which excluded mine drainage from not only regulatory control but from the definition of industrial waste." 9 Pa. Commonwealth Ct. at 57, 303 A. 2d at 571. The logic of the Commonwealth Court in this regard is perplexing since *now*, when we are applying the principles of *Shumaker* to the facts of this case, The Clean Streams Law includes mine drainage in its regulatory scheme, and declares such to be a public nuisance. The Act does not grant any preferred status to mine owners and operators in the discharge of pollutants into Pennsylvania waters.

The absence of facts supporting concepts of negligence, foreseeability or unlawful conduct is not in the least fatal to a finding of the existence of a common law public nuisance. The assumption that such might be the case is "based upon an entirely mistaken emphasis upon what the defendant has done rather than the result which has followed, and forgets completely the well established fact that negligence is merely one type of conduct which may give rise to a nuisance." W. Prosser, *Law of Torts*, § 88 at 595 (3d ed. 1964).

We note here that a placing of responsibility upon Barnes & Tucker for abating the polluting discharges from Mine No. 15 is not inconsistent with the Act of December 15, 1965, P. L. 1075, 35 P. S. § 760.1 *et seq.* which deals with pollution from abandoned mines and provides in part: "§ 760.1. Program to correct. The Secretary of the Department of Mines and Mineral Industries shall initiate an immediate action program to correct pollution from abandoned deep and strip mines on each of the watersheds in the Commonwealth of Pennsylvania." This legislation is directory and not mandatory, and in any event is intended to provide an *additional* means to remedy such pollution, not the *only* means.

IV.

Having determined that there is a basis upon which the Commonwealth *could* be granted relief, we must now determine whether relief *should* be granted. Prior to such determination, however, we dismiss the defense raised by Barnes & Tucker of legislative authority. Although it is true that the legislature, within constitutional limitations, may authorize that which would otherwise be a nuisance, there has been no such authorization. Nor can such authorization be inferred vis-a-vis the express legislative declaration of nuisance. Furthermore, the fact that Barnes & Tucker operated in accordance with The Clean Streams Law cannot give rise to the conclusion that the discharge of acid mine drainage during such operation was *authorized* by that law. At best it can be concluded that such discharges were *permitted*.[12]

We next address the question of whether the Commonwealth is barred in this action under doctrines of laches, waiver, or estoppel. The Commonwealth is certainly not chargeable with laches. The polluting discharges here in question first occurred in June of 1970 and a complaint was filed by the Commonwealth in this case less than two months thereafter.

Nor can the Commonwealth be held to have waived the right to enjoin the discharge from Mine No. 15 into the Susquehanna watershed or to be estopped from doing so. The facts of this case show that the last time Barnes & Tucker had been allowed by permit to discharge mine drainage into the Susquehanna watershed was in 1960, over ten years prior to the commencement of this action. Even if such were not the facts, stream polluters can

12. We are not called upon to decide the more difficult question of whether a public nuisance can exist during the pendency of a valid mine drainage permit.

acquire no prescriptive or property right to pollute as against the Commonwealth no matter how long their conduct has been tolerated. *Commonwealth ex rel. Shumaker v. New York & Pennsylvania Co., Inc.*, 367 Pa. 40, 45, 79 A. 2d 439, 444 (1951); *Pennsylvania R. R. v. Sagamore Coal Co.*, 281 Pa. 233, 249, 126 A. 386, 391 (1924). Furthermore, Section 701 of The Clean Streams Law, 35 P. S. § 691.701, specifically speaks to this question: "It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate the pollution of the waters of this Commonwealth, and nothing in this act contained shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under the common law or statutory law, criminal or civil, nor shall any provision in this act, or the granting of any permit under this act, or any act done by virtue of this act, be construed as estopping the Commonwealth, persons or municipalities, in the exercise of their rights under the common law or decisional law or in equity, from proceeding in courts of law or equity to suppress nuisances, or to abate any pollution now or hereafter existing, or enforce common law or statutory rights."

The imposition of liability in this case also requires our consideration of constitutional objections based on the Fourteenth Amendment to the United States Constitution and article I, Section 10, of the Pennsylvania Constitution. We do not believe that a finding of liability for and responsibility to abate the discharge from Mine No. 15 would deny Barnes & Tucker due process of law,[13] or equal pro-

13. Several questions which were previously discussed in another context might also be raised here under a due process argument. They include the facts that the Commonwealth had not in the past moved to enjoin the discharge of mine drainage during the operation of Mine No. 15 and that the operation of Mine No. 15 was in accordance with The Clean Streams Law. These contentions do not raise additional due process problems. Not only can one not obtain a prescriptive right to maintain a public nuisance,

tection of the law,[14] in violation of either the United States or Pennsylvania constitutions.

Initially we dismiss the contention that Section 3 of The Clean Streams Law, as amended in 1970 is a retrospective law. This section is merely declaratory of the common law which at all times provided for the abatement of pollution of waters of the Commonwealth. Even if we treat the sections of The Clean Streams Law which from time to time exempted mine drainage from regulation, as legislative authority for such drainage, that authority ceases when such legislation is repealed or amended. *Wartman v. Philadelphia,* 33 Pa. 202 (1859). Legislative withdrawal of a prior grant of a privilege is not retrospective legislation. Nor do we think this result to be unfair, especially under the facts of this case. During the time that Mine No. 15 was operated pursuant to a mine drainage permit, Barnes & Tucker had, *at best,* a limited privilege to discharge untreated acid mine drainage. Moreover, at all times permit holders were on notice that the exemption from regulation of acid mine drainage was applicable only until "practical means for the removal

13. (Cont'd.)
but where the state police power is found to exist, it is not lost by non-exercise, but remains to be exerted as local exigencies may demand. *Kelly v. Washington,* 302 U. S. 1, 14 (1937). As to the second contention, the United States Supreme Court noted in *Queenside Hills Co. v. Saxl,* 328 U. S. 80, 83 (1946), that: "In no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws."

14. We summarily dismiss Barnes & Tucker's claim that the prosecution of this action constitutes a denial of the equal protection of the laws. There has been no showing that the Commonwealth's action was an intentional discrimination in the enforcement of the law. Indeed, since to a large extent this is a case of first impression, and recognizing the substantial costs of litigation here involved, it is only reasonable that the Commonwealth await the ultimate outcome of this case before bringing similar actions.

of the polluting properties of such drainage shall become known." 35 P. S. § 691.310 (repealed 1965). Permit holders were also forewarned of the possibility of future regulations of mine drainage in Section 701 of The Clean Streams Law, discussed, *supra,* and in the standard conditions accompanying all permits.[15] Even if liability for the discharge of mine drainage was made abatable for the first time under any theory by the 1970 amendments, a recognition of the Commonwealth's claim based thereon would not require that we place a retrospective construction on these amendments. Rather, we would be applying that section to a condition which existed on the date when the amendments covering discharges from abandoned mines became effective, even though such condition resulted from events which occurred prior to their effective date. *See Creighan v. Pittsburgh,* 389 Pa. 569, 132 A. 2d 867 (1957).

Whether it is a "taking of property" to require Barnes & Tucker to treat or abate the discharge from Mine No. 15 is a more difficult question. The power of the Attorney General to abate public nuisances is an adjunct of the inherent police power of the Commonwealth. There is often a thin line separating that which constitutes a valid exercise of the police power and that which constitutes a taking. The United States Supreme Court has abnegated any generally applicable standards in this area, but the

15. *See, e.g.,* Standard Conditions Relating to Mine Drainage, dated May 18, 1961, providing, *inter alia:* "FOURTEENTH: Nothing herein contained shall be construed to be an intent on the part of the Sanitary Water Board to approve any act made or to be made by the permittee inconsistent with the permittee's lawful powers or with existing laws of the Commonwealth regulating industrial wastes and mine drainage or the practice of professional engineering, nor shall be construed as approval of the structural adequacy of any structures; nor shall this permit be construed to permit any act otherwise forbidden by any laws of the Commonwealth of Pennsylvania or of the United States."

classic rule of *Lawton v. Steele*, 152 U. S. 133 (1894), is instructive.

"To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Id.* at 137.

From our prior discussion it is clear that the public interest requires the interposition of the Commonwealth's authority in this case. Furthermore, since the activity involved is a public nuisance it cannot be regulated, but must be abated. We believe that abatement of water pollution is unquestionably a reasonable exercise of the police power in the abstract. We are not swayed in this belief by the fact that the mining activity which gave rise to the present condition is past conduct which obviously cannot now be abated. *See, e.g., Commonwealth ex rel. Chidsey v. Black*, 363 Pa. 231, 69 A. 2d 376 (1949) (decree entered requiring defendants to remove all of the material in existing spoil piles from past strip mining, or take necessary steps to prevent the discharge of acid mine drainage therefrom into waters of the Commonwealth); *Commonwealth v. Ebersole*, 59 Lanc. L. Rev. 363 (Pa. C. P. 1965) (upheld conviction under The Clean Streams Law against defendant who permitted the leaching from his landfill to flow into waters of the Commonwealth). *See also People v. New Penn Mines, Inc.*, 212 Cal. App. 2d 667, 28 Cal. Rptr. 337 (1963), wherein post-mining discharge was held to be within California's water pollution statute.

We recognize that when the Commonwealth brings an equity action to abate a public nuisance its right to relief is not restricted by any balancing of equities, nor by any rule of damnum absque injuria. *Commonwealth ex rel. Shumaker v. New York & Pennsylvania Co.*, 367 Pa. 40, 79 A. 2d 439 (1951); *Commonwealth ex rel. v. Philadelphia & Reading Coal & Iron Co.*, 50 Pa. D. & C. 411 (Phila. C. P. 1944). The exercise of the police power is nevertheless restricted by the parameters of reason. Whether the Commonwealth's use of such power in this case would be unduly oppressive upon Barnes & Tucker would naturally depend on the relief granted. The prayer for relief was for the abatement or treatment of the discharge from Mine No. 15. On the present record it would be impossible for this Court to fashion an appropriate decree. The precise nature of relief which would be warranted and reasonable in this case must rest with the chancellor who may need to take additional testimony and make additional findings of fact in so determining.[16]

Accordingly, the decree of the Commonwealth Court is reversed, and the matter remanded for proceedings consistent with this opinion. Costs on appellee.

Mr. Justice MANDERINO took no part in the consideration or decision of this case.

16. The possibility of sealing and isolating Mine No. 15 so as to prevent future discharges may exist, but the feasibility of such relief was not directly addressed below. Much of the testimony below was concerning the mines adjacent to Mine No. 15, the barriers and cut throughs between them, the quantity and quality of water generated in each of the mines, the amount of fugitive water migrating into Mine No. 15, and whether, but for the fugitive waters, any discharge would occur at Mine No. 15. We believe a finding in regard to the sources of water being discharged from Mine No. 15 would be relevant in a determination of the appropriate relief. In this regard we note a key distinction from the situations present in *Commonwealth v. Harmar Coal Co.* and *Commonwealth v. Pittsburgh Coal Co.*, 452 Pa. 77, 306 A. 2d 308 (1973). Those cases involved the *pumping* of water from abandoned mines in connection with the *operation* of working mines. In the present case we are essentially dealing with a natural discharge (but for the pumping at Duman Dam) from an *abandoned* mine which may include acid mine drainage which originated in adjacent abandoned mines.

COMMONWEALTH OF PENNSYLVANIA

v.

BARNES & TUCKER COMPANY.

Commonwealth Court of Pennsylvania.

Argued September 10, 1975.

Decided March 2, 1976.

K. W. James Rochow, Michael S. Alushin, Asst. Atty's Gen., Harrisburg, for plaintiff.

Cloyd R. Mellott, C. Arthur Wilson, Jr., John R. Kenrick, Eckert, Seamans, Cherin & Mellott, Pittsburgh, (Def.) Rhoads, Sinon & Reader, Frank A. Sinon, Harrisburg, for defendant.

Before BOWMAN, President Judge, and CRUMLISH, JR., KRAMER, WILKINSON, MENCER, ROGERS and BLATT, JJ.

BOWMAN, President Judge.

In reversing this Court and remanding the case to us for further proceedings consistent with its opinion, *Commonwealth v. Barnes & Tucker Company,* 455 Pa. 392, 319 A. 2d 871 (1974), the Supreme Court, in our analysis of its opinion, has unequivocally declared:

(1) that the discharge of acid mine drainage from Mine No. 15 into the waters of the Commonwealth constitutes a public nuisance at common law as well as under the applicable statutory law, and that relief could be granted under either of these theories.

(2) that the absence of facts supporting concepts of negligence, foreseeability or unlawful conduct is not fatal to a finding that a common law nuisance exists.

(3) that the doctrine of laches, waiver or estoppel as against the Commonwealth are not available to Barnes &

Tucker; nor can those who pollute streams acquire prescriptive or property rights to so pollute as against the Commonwealth.

Having so declared, the Supreme Court then addressed itself to the issue of whether relief should be granted in these words; "[h]aving determined that there is a basis upon which the Commonwealth *could* be granted relief, we must now determine whether relief *should* be granted." *Barnes & Tucker, supra,* 445 Pa. at 414, 349 A. 2d at 883. (Emphasis in original.) However, the Supreme Court did not resolve this issue but instead, remanded the proceedings to this Court.

It is this language and that found in subsequent portions of its opinion that has produced total disagreement as between the parties of the issues on remand.

In addressing itself to the broad issue of whether relief *should* be granted against Barnes & Tucker in abatement of the instant public nuisance, the Supreme Court totally rejected, in our view, a number of constitutional arguments advanced by Barnes & Tucker. As to these arguments, it said:

> "The imposition of liability in this case also requires our consideration of constitutional objections based on the Fourteenth Amendment to the United States Constitution and article I, Section 10, of the Pennsylvania Constitution. We do not believe that a finding of liability for and responsibility to abate the discharge from Mine No. 15 would deny Barnes & Tucker due process of law,[13] or equal protection of

"13. Several questions which were previously discussed in another context might also be raised here under a due process argument. They include the facts that the Commonwealth had not in the past moved to enjoin the discharge of mine drainage during the operation of Mine No. 15 and that the operation of Mine No. 15 was in accordance with The

the law,[14] in violation of either the United States or Pennsylvania constitutions." 455 Pa. at 416-17, 319 A. 2d at 884.

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13. (Cont'd.)
Clean Streams Law. These contentions do not raise additional due process problems. Not only can one not obtain a prescriptive right to maintain a public nuisance, but where the state police power is found to exist, it is not lost by non-exercise, but remains to be exerted as local exigencies may demand. *Kelly v. Washington,* 302 U. S. 1, 14, 58 S. Ct. 87, 82 L. Ed. 3 (1937). As to the second contention, the United States Supreme Court noted in *Queenside Hills Co. v. Saxl,* 328 U. S. 80, 83, 66 S. Ct. 850, 852, 90 L. Ed. 1096 (1946), that: 'In no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws.'

"14. We summarily dismiss Barnes & Tucker's claim that the prosecution of this action constitutes a denial of the equal protection of the laws. There has been no showing that the Commonwealth's action was an intentional discrimination in the enforcement of the law. Indeed, since to a large extent this is a case of first impression, and recognizing the substantial costs of litigation here involved, it is only reasonable that the Commonwealth await the ultimate outcome of this case before bringing similar actions.

In response to other constitutional arguments advanced by Barnes & Tucker, the Supreme Court identifies the issues on remand as we understand its opinion. These issues are more circumscribed than as posed by Barnes & Tucker but not so simplistic as posed by the Commonwealth, which insists that our sole responsibility is to determine whether alternate means of abatement are available if Barnes & Tucker offered additional evidence on this subject, which it did not.

The critical portions of the Supreme Court's opinion from which we identify our responsibility on remand as circumscribed by its pronouncements heretofore referred to, are found in the following excerpts:

"Whether it is a 'taking of property' to require Barnes & Tucker to treat or abate the discharge from Mine No. 15 is a more difficult question. The power of the Attorney General to abate public nuisances is an adjunct of the inherent police power of the Commonwealth. There is often a thin line separating that which constitutes a valid exercise of the police power and that which constitutes a taking. The United States Supreme Court has abnegated any generally applicable standards in this area, but the classic rule of *Lawton v. Steele,* 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894), is instructive.

" 'To justify the state in . . . interposing its authority in behalf of the public, it must appear—First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' Id. at 137, 14 S. Ct. [499] at 501 [38 L. Ed. 385].

"From our prior discussion it is clear that the public interest requires the interposition of the Commonwealth's authority in this case. Furthermore, since the activity involved is a public nuisance it cannot be regulated, but must be abated. We believe that abatement of water pollution is unquestionably a reasonable exercise of the police power in the abstract. We are not swayed in this belief by the fact that the mining activity which gave rise to the present condition is past conduct which obviously cannot now be abated. . . .

"We recognize that when the Commonwealth brings an equity action to abate a public nuisance its right to relief is not restricted by any balancing of

equities, nor by any rule of damnum absque injuria. [Citations omitted.] The exercise of the police power is nevertheless restricted by the parameters of reason. Whether the Commonwealth's use of such power in this case would be unduly oppressive upon Barnes & Tucker would naturally depend on the relief granted. The prayer for relief was for the abatement or treatment of the discharge from Mine No. 15. On the present state of the record it would be impossible for this Court to fashion an appropriate decree. The precise nature of relief which would be warranted and reasonable in this case must rest with the chancellor who may need to take additional testimony and make additional findings of fact in so determining.[16] 455 Pa. at 418-20, 319 A. 2d at 885-86.

"16. The possibility of sealing and isolating Mine No. 15 so as to prevent future discharges may exist, but the feasibility of such relief was not directly addressed below. Much of the testimony below was concerning the mines adjacent to Mine No. 15, the barriers and cut throughs between them, the quantity and quality of water generated in each of the mines, the amount of fugitive water migrating into Mine No. 15, and whether, but for the fugitive waters, any discharge would occur at Mine No. 15. We believe a finding in regard to the sources of water being discharged from Mine No. 15 would be relevant in a determination of the appropriate relief. In this regard we note a key distinction from the situations present in *Commonwealth v. Harmar Coal Co.* and *Commonwealth v. Pittsburgh Coal Co.*, 452 Pa. 77, 306 A. 2d 308 (1973). Those cases involved the *pumping* of water from abandoned mines in connection with the *operation* of working mines. In the present case we are essentially dealing with a natural discharge (but for the pumping at Duman Dam) from an *abandoned* mine which may include acid mine drainage which originated in adjacent abandoned mines." (Emphasis in original.)

Addressing ourselves first to the possibility of sealing and isolating Mine No. 15, the record of the case discloses no definitive testimony or other evidence on this subject,

nor did either party on remand choose to offer additional evidence on this subject. While the volume and source of mine water "generated" in Mine No. 15 and flowing into it from adjoining and nearby subsurface mines by reason of pressure or gravity are highly disputed as between the parties' experts, there is no dispute that the volume of mine water flowing into and accumulating in it precludes any effort to perfectly seal it from adjoining mines, to seal it against a breakout, or to foreseeably estimate a diminution of volume enabling the mine itself to reservoir the mine water.

On the record before us, if the discharge of acid mine drainage from Mine No. 15 "must be abated" there is no alternative method of relief available to that of the treatment of the discharging mine water. The one known and demonstrated method treatment as disclosed by the record is by the method and means employed at the Duman Dam facility. Other means and methods may exist or develop in future technology. However, if Barnes & Tucker is to be required to abate this public nuisance, the chancellor, in fashioning the abatement relief, has before him no alternatives and must order abatement by this means and method, subject, of course, to future modification of the abatement order upon proper proof and showing of feasibility of an alternative course of action.

Leading to the difficult issue of whether the only abatement relief that can be fashioned by this Court would equate an unconstitutional taking of property of Barnes & Tucker or be beyond the "parameters of reason", the Supreme Court strongly suggests the relevancy of the quality and quantity of mine water findings its way into Mine No. 15 from adjoining or nearby subsurface mines.

In our original opinion, *Commonwealth v. Barnes & Tucker Company*, 9 Pa. Cmwlth. 1, 303 A. 2d 544 (1973),

we made extensive findings of fact in both narrative form and by enumerated findings which we deemed essential to the opinion as rendered. We did not, however, make such findings particularly directed to this subject. Having again reviewed the record, we restate for background purposes and make findings of fact on this subject.[1]

Before doing so, we shall briefly discuss the evidence on this subject and our reasons in support of these findings. The "generation" of water in subsurface mines appears to be a word of art employed by mining hydrologists and others knowledgeable in the field to identify by volume the amount of water flowing or percolating into a mine by gravity from the land surface. "Fugitive mine water" is a phrase used to identify mine water entering a particular mine by gravity or pressure from adjoining subsurface mines. Thus, the volume of mine water entering or contained in a particular mine is the combined volume of generated and fugitive mine water.

The methodology by which such mine waters are measured, both as to source and volume, is disputed by the parties' experts, all of whom premised their opinions on necessary assumptions for want of actual knowledge of the conditions of pillars in and barriers between all of the several mines of the complex known as the Barnesboro Basin, and the absence of scientific criteria to support fundamental assumptions.

The subsurface geology of the basin with marked synclines and anticlines containing several seams of coal and encompassing a number of mining complexes posed extremely difficult, if not insurmountable, obstacles to the witnesses in expressing their expert opinions, and equally, if not greater, difficulty to us in evaluating such evidence.

1. As this bitterly contested case is undoubtedly destined for another review by our Supreme Court, these findings will enable the Supreme Court to finally dispose of this dispute on the merits.

Within this mining complex and stated by the witnesses for Barnes & Tucker as contributory fugitive mine water into Mine No. 15 are the Moss Creek Mine, Colver Mine, the Sterling complex of mines and Lancashire Mine No. 14 (owned and operated by Barnes & Tucker).

On balance, we believe the testimony of the expert witnesses for Barnes & Tucker, as supported and illustrated by sundry exhibits, carries more weight. Their ultimate opinions as to generation of water in Mine No. 15 and the source and volume of fugitive mine water entering Mine No. 15 in areas in which there is conflicting testimony is, therefore, accepted.

Restated and Additional Findings of Fact.

1. Mine No. 15, a bituminous deep coal mine, is located in the "B" or Lower Kittanning seam of coal in an area of Cambria County and Indiana County, Pennsylvania, known as the Barnesboro Basin. The Barnesboro Basin is an area bounded on the east by the Laurel Hill Anticline, on the west by the Nolo Anticline, on the south by unmined coal, and on the north by the West Branch of the Susquehanna River. The Laurel Hill Anticline and the Nolo Anticline represent the highest points of the Basin in terms of elevation. The lowest portion of the Basin which lies between those two anticlines is known as the Barnesboro Syncline. At the southerly end of the Basin, the Barnesboro Syncline is in unmined coal. From that point, it progresses eastwardly to a mined area in a mine known as the Colver Mine and then northwardly into Mine No. 15. It then progresses through the length of Mine No. 15 into a mine known as Springfield No. 4 and then out the northern end of the Basin. Most of the area of Mine No. 15 is located in the Barnesboro Syncline and is located in the lowest portion of the Barnesboro Basin. It contains approximately 6,600 acres.

2. The driftmouth of Mine No. 15 is located near Bakerton on the West Branch of the Susquehanna River at an elevation of approximately 1,531 feet. A drift opening in a mine is an opening which is made at a point where the coal seam in which the mine is located outcrops at or near the surface of the ground.

From the point where the driftmouth of Mine No. 15 is located at the outcrop of the "B" seam of coal near the West Branch of the Susquehanna River, the "B" seam of coal slopes downward in a southwesterly direction.

3. The earliest mining in Mine No. 15 was in the year 1915 and was done in the northeasterly section of the mine at or near where the "B" seam of coal outcrops near the West Branch of the Susquehanna River. From that point, the mining in Mine No. 15 was done to the dip, that is, from the highest point of elevation in the mine at the outcrop down the slope of the "B" seam in a southwesterly direction to the lowest area of the mine which is at an elevation of approximately 1,230 feet.

4. There are known cut throughs between the Sterling mine complex and Lancashire Mine No. 14, and between Lancashire Mine No. 14 to Mine No. 15.

5. There are breached barriers between the Colver Mine and the Sterling mine complex and between the Colver Mine and Mine No. 15 which would permit the flow of water through those barriers from Colver.

6. There are breached barriers between the Sterling mine complex and Mine No. 15 and Lancashire No. 14 which would permit the flow of water through those barriers from the Sterling mine complex.

7. The Colver Mine, the Sterling mine complex, the Moss Creek Mine and Lancashire Mine No. 14 are all

under less cover than Mine No. 15 and would, therefore, generate more water than Mine No. 15.

8. Caving has occurred in a portion of Mine No. 15 under the Moss Creek Mine complex where pillaring was done. As a result, the strata between the two mines is broken in this area which permits the flow of water from the Moss Creek Mine complex into Mine No. 15.

9. Although mine water generated in other mines in this complex of mines and flowing into Mine No. 15 as fugitive mine water may have varying relative alkaline properties as generated in such mines, its acid content increases as it passes along the strata, pillars and through breached barriers containing high acid properties.

10. There has been pillaring on both sides of the barriers between Mine No. 15 and the Colver Mine, between Mine No. 15 and the Sterling mine complex, and between the Colver Mine and the Sterling mine complex.

11. The pillaring referred to in paragraph 10 would result in a fracturing at a minimum angle of draw of 15° from both sides of the barrier. This would result in a complete fracturing of the barrier at the top of the cone and allow water to flow into Mine No. 15.

12. At one point along the barrier between the Colver Mine and Mine No. 15, the top of the cone, using the 15° angle of draw, would be 25 to 50 feet below the water level in the Colver Mine; and, using the 18° angle of draw, would be 85 feet to 130 feet below the water level in the Colver Mine. The higher the angle of draw the greater the amount of water which would flow over the top of the cone from Colver Mine into Mine No. 15.

13. The water level in the Colver Mine is at an elevation of approximately 1,680 feet, while the coal elevation

in Mine No. 15 at the location opposite the barrier between Mine No. 15 and the Colver Mine is approximately 1,235 feet; and the water level in Mine No. 15 at the time of the trial was approximately 1,480 feet. This would result in a head (height difference) of water of approximately 425 feet to 450 feet against the barrier in the Colver Mine adjacent to Mine No. 15, and a net water head differential between the two mines of 178 feet to 200 feet.

14. There is a substantial pool of water of approximately 3 billion gallons in the Colver Mine against the barriers of that mine with the Sterling mine complex and Mine No. 15.

15. The total acreage in Mine No. 15 is 6,600 acres, while the total acreage of the Colver Mine within the drainage basin is 8,320 acres.

16. The total water being discharged from the Colver Mine on May 23, 1966, was 9.48 million gallons per day. At the time of trial, the total water being discharged from the Colver Mine, by virtue of a gravity discharge, was 3.35 million gallons per day, over 6 million gallons per day less than the earlier date, at a time when less mining and pillaring had been done in the mine. Mining, including pillaring, has continued on a regular basis in the Colver Mine since May 1966.

17. At the time that it was decided to let the water in the Colver Mine accumulate in the lower portion of that mine next to Mine No. 15 and the Sterling mine complex, it was the expectation of its owner that there would be a flow of water into the Sterling mine complex.

18. There is a considerable amount of sandstone in the area of Mine No. 15, the Colver Mine, and the Sterling mine complex which would act like a pipeline for the transference of mine water. Voids created by disintegrating pillars and breaches between barriers also permit transference of substantial quantities of mine water.

19. There has been actual observation of quantities of water flowing into Mine No. 15 through a barrier between it and the Sterling Mine.

20. The primary purpose of barriers between coal mines in bituminous coal fields is to protect the miners in active coal mines by preventing the sudden influx or inrush of water into the active workings which would endanger the lives of the men in those workings. The purpose is not to prevent the flow of water from one mine to another.

21. To maintain a static level of water in Mine No. 15 thereby avoiding a breakout by pressure or other discharge, it is necessary to pump from the mine approximately 7.2 million gallons per day.

22. Of this pumping figure, approximately 1.2 million gallons per day are attributable to water generated in Mine No. 15 while approximately 6 million gallons per day are attributable to fugitive mine water generated in other mines in the complex and finding its way into Mine No. 15.

23. The evidence is inconclusive as to whether Mine No. 15, if totally isolated from fugitive mine water or if receiving only a modest volume of fugitive mine water, would or would not produce a breakout or other surface discharge at some time in the future by reason of the mine water generated in Mine No. 15. To guard against such a possibility, the volume of mine water to be pumped and treated would, however, be of a substantially lesser quantity.

24. The monthly cost of pumping and treating acid mine water being pumped from Mine No. 15 to maintain a

relative static level of water in said mine as directed by preliminary injunction and permanent injunction varies between $30,000 and $50,000.

25. There is no evidence of record by way of estimate or otherwise as to a foreseeable time at which Mine No. 15 will maintain itself at a static level without the necessity of pumping and treatment of the pumped acid mine water discharge. There is evidence that the degree of acidity of the discharge may slowly be reduced as the mine "cleans" itself.

26. The evidence is inconclusive as to the comparative quality of mine water generated in Mine No. 15 as against that of fugitive mine water finding its way into said mine from other mines.

Given these facts, we now consider whether the only possible effective abatement order that can be entered on the record before us would (a) constitute an exercise of the police power equivalent or amounting to a taking of property without just compensation, or (b) as being beyond the "parameters of reason" in an otherwise valid exercise of the police power.

As a threshold argument on these two related and perhaps inseparable issues, Barnes & Tucker contends that a fundamental prerequisite to the imposition of the *relief* required in this case is a showing that defendant's conduct proximately caused the creation of the public nuisance here found to exist.

While we agree with the principle that an owner of land cannot lawfully be required to abate a public nuisance existing on his land where such ownership is unrelated to the forces or conditions resulting in a public nuisance, *Commonwealth v. Wyeth Laboratories*, 12 Pa. Cmwlth. 227, 315 A. 2d 648 (1974), we do not view Barnes & Tucker's ownership and use of Mine No. 15 as qualifying

it for application of this principle. In this case, our Supreme Court has already declared that "[t]he absence of facts supporting concepts of negligence, foreseeability or unlawful conduct is not in the least fatal to a finding of the existence of a common law public nuisance." *Barnes & Tucker, supra,* 455 Pa. at 414, 319 A. 2d at 883. We understand this to mean that traditional criteria to establishment of tortious or unlawful conduct in the law of negligence has no application in public nuisance cases for the reason that such an assumption is "based upon an entirely mistaken emphasis upon what the defendant has done rather than the result which has followed, and forgets completely the well established fact that negligence is merely one type of conduct which may give rise to a nuisance." W. Prosser, Law of Torts, § 88, at 595 (3d ed. 1964).

Here the activity or conduct of Barnes & Tucker and its predecessors, through mining operations, created the subsurface void at the subsurface elevations within Mine No. 15 in the Barnesboro Basin complex of mines. Out of this activity was created a condition which has in turn resulted in a public nuisance. Whether the impelling force which produced the public nuisance is solely or partially that of fugitive mine water flowing into and adding to the generated water of that mine, the conduct of Barnes & Tucker in its mining activity remains the dominant and relevant fact without which the public nuisance would not have resulted where and under the circumstances it did. In our opinion, Barnes & Tucker does not qualify as exempt from the imposition of relief in abatement of a public nuisance for want of conduct or activity by it bearing upon the forces and conditions producing the public nuisance. Whatever vitality our decision in *Pittsburgh Coal Company v. Sanitary Water Board*, 4 Pa. Cmwlth. 407, 286 A. 2d 459 (1972), may retain, having been reversed by the

Supreme Court,[2] and considered in light of the Supreme Court decision in this case, its pronouncements cannot support Barnes & Tucker's contention here that want of proof of proximate cause in traditional negligence concepts has constitutional proportions to be applied to the relief to be ordered in abatement of a public nuisance.

The "difficult question" of whether the only possible effective abatement order that can be entered in this case constitutes, in itself, such a taking, or as being beyond the parameters of reason, finds no ready answer in our case law precedents.

Couched in terms of economic impact, our courts have consistently held an otherwise valid exercise of the police power does not effectuate a constitutional taking of property for public use even though (a) its exercise resulted in the entire suppression of the business, *Commonwealth v. Emmers,* 221 Pa. 298, 70 A. 762 (1908); (b) or at whatever the cost to the party introducing the danger being proscribed, *Erie Railroad Company v. Board of Public Utility Commissioners,* 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322 (1921); and (c) even when it forces the offending industry out of business, *Bortz Coal Company v. Commonwealth,* 2 Pa. Cmwlth, 441, 279 A. 2d 388 (1971).

However, the application of these pronouncements in public nuisance cases has not always been absolute (a) where such drastic results are "patently beyond the necessities of the case", *Commonwealth ex rel. Allegheny County v. Toth,* 189 Pa. Super. 552, 152 A. 2d 284 (1959), or (b) where further proceedings are indicated to inquire whether the resulting damage could be avoided and whether the expense to abate would be practically prohibitive, *Commonwealth v. Wyeth Laboratories, supra;* or,

2. 452 Pa. 77, 306 A. 2d 308 (1973).

as suggested by the Supreme Court in this case, (c) as being beyond the parameters of reason.

From these decisions and many others expressing similar principles, we are of the opinion that a proper exercise of the police power by legislative enactment[3] does not, in itself, constitute a taking of property for public use, or its equivalent, regardless of the economic impact upon the property of the persons affected thereby. However, as to governmental action in enforcement of such legislation which does not itself absolutely proscribe a particular use, conduct or activity, the means of enforcement must be carefully scrutinized to determine its necessity in accomplishment of the objections of the legislation and its reasonableness as measured by alternative available remedies and by the relative conflicting public interest as against the private interest. This, of course, produces a case by case approach to this difficult question.

In this case, however, we have no way of measuring such economic impact. Although afforded an opportunity on remand to introduce such additional evidence as it deemed relevant to the issues on remand, Barnes & Tucker did not see fit to introduce any new evidence into the case. We are thus without knowledge of its capital structure, assets and liabilities or its profits or losses, if any.

We know only the monthly costs, now accumulated over several years, of operating the Duman Dam facility to pump and treat the mine water accumulating in Mine No. 15, which has been closed and remains closed to this date. On such a record Barnes & Tucker would have us declare that the costs of operating the Duman Dam facility at its expense as the only presently known method of abating the nuisance in question is the equivalent of a taking

3. *Cf. Gambone v. Commonwealth,* 375 Pa. 547, 101 A. 2d 634 (1954), as illustrative of an attempted exercise of the police power held to be improper in itself.

of its property or as beyond the parameters of reason, thereby effectively isolating this cost from the relative economic impact thereof upon its corporate assets and profits. No precedent is cited for such a convenient insulation of corporate assets from its responsibility and attendant costs of abating this public nuisance, and we will not establish one here by concluding that the cost of treating the mine drainage is per se beyond the parameters of reason or the equivalent of a taking of its property. As measured against the deleterious impact of the untreated mine water entering the waters of the Commonwealth upon the health, safety and welfare of the citizens of the Commonwealth, not to mention the less obvious impact upon the environment in general, Barnes & Tucker falls far short of the burden required of it to preclude entry of an abatement order on constitutional grounds.

We conclude on the record before us:

1. That the only known effective abatement order which can be entered in this case is to direct the pumping and treatment of the acid mine water accumulating in Mine No. 15, and to produce through such treatment, discharged water meeting minimum water quality standards as prescribed by regulation.

2. That the discharge by breakout at the surface or otherwise, of accumulated acid mine water from Mine No. 15 into the waters of the Commonwealth, being a public nuisance, is, for purposes of the abatement thereof, the responsibility of Barnes & Tucker and that it has such responsibility regardless of the quality or quantity of fugitive mine water finding its way into Mine No. 15 from adjoining or nearby subsurface mines.

3. That the only known effective abatement order which can be entered in this case does not constitute a taking of the property of Barnes & Tucker, or its equivalent, contrary to its constitutional right to just compensation for property so taken.

4. That the only known effective abatement order which can be entered in this case is not beyond the parameters of reason nor other test in determination of the need for a reasonableness of an abatement order.

Accordingly, on remand from the Supreme Court of Pennsylvania, we enter the following

FINAL DECREE

Now, March 2, 1976, it is hereby decreed and ordered as follows:

1. Barnes & Tucker Company is hereby enjoined from causing or permitting the discharge of untreated acid mine water drainage, by breakout or otherwise, from Mine No. 15 into the waters of the Commonwealth.

2. For the purpose of avoiding repetition of such a breakout or the discharge of untreated acid mine water from Mine No. 15 into the waters of the Commonwealth, a public nuisance; and until such time as the likelihood of a reoccurrence of another breakout is past, Barnes & Tucker Company shall cause to be pumped from Mine No. 15 sufficient quantities of mine water to avoid any such breakout and shall maintain a treatment program of the mine water discharge to achieve minimum water quality standards as prescribed by law pertaining to the discharge of acid mine water into the waters of the Commonwealth.

3. Expenses incurred by the Commonwealth in the operation and maintenance of the Duman Dam pumping and treatment facility or sums paid by the Commonwealth to Barnes & Tucker incident to the operation of said pump-

ing and treatment facility by Barnes & Tucker during the course of this litigation as prescribed in our prior Orders of April 13, 1971, June 7, 1973 and September 20, 1974, shall be entered as a money judgment in favor of the Commonwealth and against Barnes & Tucker Company. If the parties can agree and so stipulate as to the sum certain thereof, a judgment in said amount will be entered as a supplement to this Decree and Order. If the parties cannot agree as to the sum certain thereof, after hearing on the issue, a judgment in a sum certain will be entered as a supplement to this Decree and Order.

COMMONWEALTH OF PENNSYLVANIA

v.

BARNES & TUCKER COMPANY.

—

Supreme Court of Pennsylvania.

Argued November 15, 1976.

Decided February 28, 1977.

Rehearing Denied April 6, 1977.

Nos. 14 and 23 May Term, 1977.

Affirmed.

Eckert, Seamans, Cherin & Mellott, Cloyd R. Mellott, C. Arthur Wilson, Jr., John R. Kenrick, Pittsburgh, Rhoads, Sinon & Reader, Frank A. Sinon, Harrisburg, Schnader, Harrison, Segal & Lewis, James D. Crawford, Philadelphia, for appellant.

K. W. James Rochow, Harrisburg, for appellee.

Before JONES, C. J., and EAGEN, O'BRIEN, ROBERTS, POMEROY and NIX, JJ.

OPINION OF THE COURT

JONES, Chief Justice.

Appellant, Barnes & Tucker Company, appeals from the decree of the Commonwealth Court requiring it to operate the Duman Dam pumping facility for the purpose of preventing the discharge of untreated acid mine water at its Mine No. 15, located in an area of Cambria and Indiana Counties, Pennsylvania known as the Barnesboro Basin. This case was previously before this Court on appeal for the purpose of determining the "power of the

Department of Environmental Resources to enjoin acid mine drainage from abandoned mines." [1]

In that appeal, we found:

"The third and fourth bases upon which the Commonwealth claims relief should be granted are the doctrines of statutory and common law public nuisances. We find that relief may be granted under *either* of these theories." 455 Pa. at 408, 319 A. 2d at 880.

We went on in our opinion to hold that:

"From our prior discussion it is clear that the public interest requires the interposition of the Commonwealth's authority in this case. Furthermore, since the activity involved is a public nuisance it cannot be regulated, but must be abated. We believe that abatement of water pollution is unquestionably a reasonable exercise of the police power in the abstract. We are not swayed in this belief by the fact that the mining activity which gave rise to the present condition is past conduct which obviously cannot now be abated." 455 Pa. at 418-19, 319 A. 2d at 885.

However, due to an inadequate record, we remanded to the Commonwealth Court to fashion an appropriate decree:

"The precise nature of relief which would be warranted and reasonable in this case must rest with the chancellor who may need to take additional testimony and make additional findings of fact in so determining." 455 Pa. at 419, 319 A. 2d 886.

1. *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392, 319 A. 2d 871 (1974) (hereinafter Barnes & Tucker I).

Since we previously determined that the condition existing at Mine No. 15 is a public nuisance, the issue [2] in this appeal narrows to a two-pronged inquiry: (a) whether the means adopted by the Commonwealth Court are reasonably necessary for the abatement of the nuisance; (b) whether it would be unduly oppressive to require Barnes & Tucker to abide by the order of the Commonwealth Court.

I.

A brief review of the events preceding this appeal and the nature of the discharge of acid mine water at Mine No. 15 will be helpful in the consideration of this appeal.[3] Mine No. 15 is a deep bituminous coal mine located in the B seam of coal in the Barnesboro Basin area of Cambria and Indiana Counties near the headwaters of the West Branch of the Susquehanna River. Most of the area of Mine No. 15 is located in the lowest portion of the Barnesboro Basin. It contains approximately 6,600 acres.

The mine was originally opened in 1915 in the northeast section of the Barnesboro Basin near where the coal outcrops in the vicinity of the West Branch of the Susquehanna. From 1915 until 1969, when the mine was closed, mining operations were conducted along the dip of the coal seam in Mine No. 15, *i.e.*, from the highest elevation of the coal seam at the outcrop near the West Branch in the southwesterly direction to the lowest area of elevation of the coal seam. Barnes & Tucker ceased its mining oper-

2. Although appellant has briefed numerous other points on this appeal, these additional issues raised by appellant are not relevant to our determination of this matter since they were disposed of in our prior consideration of this case.

3. For a more detailed account of the history of Mine No. 15 and the permits under which it has operated prior to the inception of this action, *see Commonwealth v. Barnes & Tucker Co.*, 9 Pa. Cmwlth. 1, 303 A. 2d 544 (1973).

ations of Mine No. 15 on May 10, 1969, and subsequently sealed the mine openings and completed construction of barriers between the No. 15 mine and the adjacent Mine No. 24-B.[4]

In late June 1970, a substantial discharge of acid mine water drainage into the West Branch of the Susquehanna River from the Buckwheat borehole of Mine No. 15, located at the northeast end of the mine, was discovered. This discharge prompted the Sanitary Water Board[5] to issue an order (dated July 7, 1970) suspending Barnes & Tucker's permit No. 567MO35.[6] This suspension was to remain in effect until (1) the Buckwheat borehole was plugged, (2) satisfactory treatment facilities were placed in operation and (3) satisfactory plans for prevention of pollution after cessation of mining had been submitted. A subsequent Board order (dated July 16, 1970) reinstated permit No. 567MO35 subject to special conditions.

Prior to the reinstatement order of July 16, 1970, the Buckwheat borehole had been plugged, but the pool level in Mine No. 15 was rising to a level which threatened a discharge from a portal in the general vicinity of the Buckwheat borehole now plugged. Barnes & Tucker then proposed to construct relief boreholes and build treatment facilities in that area for the liming of any discharge. This second borehole (Mayberry) was constructed and treatment of its discharge began, but on July 23, 1970, another substantial acid mine water discharge from Mine No. 15 occurred in the vicinity just south of the plugged Buckwheat borehole, which became known as the breakout area.[7] This second discharge resulted in another order by the Sanitary Water Board (dated July 28, 1970) which again suspended permit No. 567MO35. Barnes & Tucker then ceased treatment of the discharge at Mayberry, the responsibility of which the Commonwealth assumed on August 22, 1970. In the meantime, Barnes & Tucker appealed to the Commonwealth Court from the Board order of July 28, 1970, and the Commonwealth initiated its complaint in equity seeking preliminary and permanent injunctive relief. The Commonwealth's prayer for relief sought to enjoin Barnes & Tucker from operating Mine Nos. 15, 24-B and 24-D, and to require Barnes & Tucker to take immediate steps to treat the acid mine water drainage to attain specified water quality standards.

The Commonwealth and Barnes & Tucker then entered into a stipulation, accepted by the Commonwealth Court, whereby the Commonwealth would continue its liming treatment of the discharge from No. 15 into the West Branch until Barnes & Tucker, pursuant to the stipulation, constructed and commenced operation of the

4. The construction of the bulkheads between Mine No. 24-B and Mine No. 15 and the sealing of Mine No. 15 by Barnes & Tucker were completed in accordance with the requirements of the Department of Mines and Mineral Industries of the Commonwealth in effect at the time the construction and sealing were done. *See Commonwealth v. Barnes & Tucker Co.*, 9 Pa. Cmwlth. 1, 7, 303 A. 2d 544 (1973).

5. Prior to the Act of December 3, 1970, P. L. 834 § 30, 71 P. S. § 510-103, the Sanitary Water Board was responsible for mine drainage. By that Act, however, the Sanitary Water Board was abolished and its functions were assumed by the Department of Environmental Resources.

6. Permit No. 567MO35 was the mine drainage permit issued after the effective date of the 1965 amendments to The Clean Streams Law, Act of August 23, 1965, P. L. 372, covering both Mines Nos. 15 and 24.

7. *Commonwealth v. Barnes & Tucker Co.*, 9 Pa. Cmwlth. at 20-21 n. 2, 303 A. 2d at 553:

> "The quality and quantity of mine water discharge from Mine No. 15 at these two points was sharply disputed. It is not necessary to resolve this dispute, however, as the evidence clearly discloses the quantity to be substantial, exceeding a million gallons per day. Its acidity level was in excess of minimum water quality standards as clearly recognized by both parties in providing for and undertaking to treat the discharge with a liming process to reduce its acidity."

Duman Dam pumping and treatment facility at the southwest end of the mine from which the treated discharge would flow into the headwaters of the Allegheny River watershed. Barnes & Tucker constructed a treatment facility at Duman Dam and commenced the operation of that facility on November 1, 1970. On February 22, 1971, Barnes & Tucker ceased operating the Duman Dam facility and its operation was assumed by the Commonwealth. On April 13, 1971, the Commonwealth Court issued a preliminary injunction providing for the continued operation of the Duman Dam facility, pending the final determination of the case upon its merits, with the parties sharing the costs of such operation on an equal basis.

Upon remand from this Court, the Commonwealth Court made additional findings of fact and entered a final decree, which reads in pertinent part:

> "2. For the purpose of avoiding repetition of such a breakout or the discharge of untreated acid mine water from Mine No. 15 into the waters of the Commonwealth, a public nuisance; and until such time as the likelihood of a reoccurrence of another breakout is past, Barnes & Tucker Company shall cause to be pumped from Mine No. 15 sufficient quantities of mine water to avoid any such breakout and shall maintain a treatment program of the mine water discharge to achieve minimum water quality standards as prescribed by law pertaining to the discharge of acid mine water into the waters of the Commonwealth.
>
> 3. Expenses incurred by the Commonwealth in the operation and maintenance of the Duman Dam pumping and treatment facility or sums paid by the Commonwealth to Barnes & Tucker incident to the operation of said pumping and treatment facility by Barnes & Tucker during the course of this litigation as prescribed in our prior Orders of April 13, 1971, June 7, 1973 and September 20, 1974, shall be entered as a money judgment in favor of the Commonwealth and against Barnes & Tucker Company."

It is from this decree that Barnes & Tucker now appeals.

II.

In light of the above background, we now move to consider the issue on this appeal concerning the constitutionality of the remedy imposed by the Commonwealth Court. Appellant argues that, since the requirements of The Clean Streams Law already have forced it for economic considerations to cease operation of Mine No. 15, to further compel it to take affirmative steps to treat the acid mine drainage emanating from its now abandoned mine is both an unreasonable exercise of the state's police power and a "taking" of private property in violation of the Fourteenth Amendment to the United States Constitution. We are not persuaded by appellant's arguments and, therefore, affirm the order of the Commonwealth Court.

The police power is the inherent power of a body politic to enact and enforce laws for the promotion of the general welfare. "It has long been recognized that property rights are not absolute and that persons hold their property 'subject to valid police regulation, made, and to be made, for the health and comfort of the people. . . .'" *De Paul v. Kauffman*, 441 Pa. 386, 393, 272 A. 2d 500, 504 (1971), quoting *Nolan v. Jones*, 263 Pa. 124, 131, 106 A. 235, 237 (1919). It must be recognized that one who challenges the constitutionality of the exercise of the state's police power, affecting a property interest, must overcome a heavy burden of proof to sustain that challenge. *See,*

e.g., Goldblatt v. Town of Hempstead, 369 U. S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); *Miller v. Schoene*, 276 U. S. 272, 48 S. Ct. 246, 72 L. Ed. 568 (1928); *Hadacheck v. Los Angeles*, 239 U. S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915); *Philadelphia v. Watt*, 162 Pa. Super. 433, 57 A. 2d 591 (1948).

As we acknowledged in our previous consideration of this case, the classic rule of *Lawton v. Steele*, 152 U. S. 133, 137, 14 S. Ct. 499, 501, 38 L. Ed. 385 (1894) is instructive in determining whether there has been an unconstitutional exercise of the state's police power:

> "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. *The legislature may not*, under the guise of protecting the public interests, *arbitrarily interfere with private business or impose unusual* and *unnecessary restrictions upon lawful occupations.*" (Emphasis added).

One of the primary factors which appellant urges should sway this Court to accept its argument is that much (perhaps the greater proportion) of the acid mine water which is being discharged by Mine No. 15 is attributable to fugitive mine [8] water, generated in other mines in the complex. It is true that the court below found, and the record supports, that of the 7.2 million gallons per day which must be pumped from Mine No. 15 in order to avoid

8. "'Fugitive mine water' is a phrase used to identify mine water entering a particular mine by gravity or pressure and adjoining subsurface mines. . . . [T]he volume of mine water entering or contained in a particular mine is the combined volume of generated and fugitive mine water." *Commonwealth v. Barnes & Tucker Co.*, 23 Pa. Cmwlth. 496, 353 A. 2d 471, 475 (1976).

a breakout of acid mine drainage, 6 million gallons are attributable to fugitive mine water. Yet, appellant fails to perceive the true nature of the injury at which the Commonwealth Court's order is directed. The objective of The Clean Streams Law, as amended, is to prevent the further discharge of pollution into the waters of the Commonwealth and not simply the cessation of future activities which are responsible for the creation of the polluting condition. Act of August 23, 1965, P. L. 372, Section 4. The deleterious condition of our waterways attributable to acid mine drainage,[9] which is being discharged from abandoned underground mines,[10] has reached a critical state. *Id.*

9. Acid mine drainage is primarily the result of acid and iron pollutants formed when the pyrite and marcasite (iron desulfides) present in coalbeds are exposed to the atmosphere and water. When coal is extracted, the pyrites in the mine are exposed to air and water. A chemical reaction occurs and the pyrite is oxidized to form ferrous sulfate and sulfuric acid. The ferrous sulfate and sulfuric acid thus formed are washed off the coal mine walls into the ground water flowing through the mine, where further hydrolizing or oxidizing occurs and ferric iron and additional acids are formed. The ferrous sulfate is then hydrolized forming ferrous iron. Next the ferrous iron is oxidized to the ferric state and additional acidity results.

The end result is that the receiving streams are loaded with sulfates, acid and iron hydroxides, as well as such dissolved minerals as aluminum, calcium, magnesium, manganese and ferrous iron. The iron hydroxides (ferrous and ferric) impart the red color which is characteristic of acid mine drainage. The most frequently observed by-product of acid mine water run-off is "yellow boy", a slightly soluble iron hydroxide which precipitates out into the streambeds. Broughton, Koza, & Selway, *Acid Mine Drainage and the Pennsylvania Courts*, 11 Duq. L. Rev. 495, 496-97 (1973) [hereinafter cited as *Acid Mine Drainage*].

"Acid drainage affects the surrounding environment by reducing the pH of both soil and streams to an extent that it is not conducive to most vegetable growth. For example, if the pH of a stream is reduced below 5.0, the stream is incapable of supporting fish. This type of pollution is responsible for a major share of the economic damage resulting from coal mine water pollution." Begley & Williams, *Coal Mine Water Pollution: Acid Problem with Murky Solutions*, 64 Ky. L. J. 507, 511 (1975-76).

10. "Underground mines produce 71.3% of all mine acid drainage, although they constitute only 58% of the number of individual

> "More than 3.5 million tons of acid mine water are discharged annually into the nations streams and rivers. The estimated annual damage from acid mine drainage in the Appalachian region is nearly ten million dollars, including loss of acquatic life, increased water treatment costs for industries and municipalities, corrosion of barges, boats, bridge piers, dams and other structures, and diminished recreational value of affected rivers and streams. Of the 5,700 miles of streams in Appalachia continuously or intermittently affected by acid mine drainage, three-fourths are found in the Susquehanna, Allegheny, Potomac and Delaware River basins in Pennsylvania, northern West Virginia and Maryland." [11]

Here, as we acknowledged in *Barnes & Tucker I*, the condition created by appellant's past mining operations constitutes a public nuisance which requires abatement. *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392, 319 A. 2d 871 (1974). It is not the source of the polluted water

10. (Cont'd.)
sources. Inactive underground mines, constituting 53% of the sources, contribute 52.5% of the total acid mine drainage. Active underground mines on the other hand, contribute 18.8% of total acid mine drainage, although they constitute only 5% of the total sources. Thus not only is the acid mine drainage problem concentrated geographically, it is also concentrated in one segment of the mining industry." *Acid Mine Drainage, supra* at 498-99, citing Appalachian Regional Commission, Acid Mine Drainage in Appalachia (1969). One study has estimated that approximately seventy-eight per cent of all acid mine drainage in Appalachia has been estimated to flow from abandoned or inactive mines. Comment, *Environmental Law —Acid Mine Drainage*, 76 W. Va. L. Rev. 508, 520 (1973-74), citing Bituminous Coal Research, Inc., Studies on Limestone Treatment.

11. Comment, *Environmental Law—Acid Mine Drainage*, 76 W. Va. L. Rev. 508 (1973-74), citing Environmental Protection Agency, Evaluation of Waste Waters from Petroleum and Coal Processing 119 (1972); Appalachian Regional Commission, Acid Mine Drainage in Appalachia, H. R. Doc. No. 180, 91st Sess. 24 (1969).

itself, but the *source of the discharge* of the acid mine water of the Commonwealth with which we are presently concerned. *See, e.g., Commonwealth v. Harmar Coal Co.* and *Commonwealth v. Pittsburgh Coal Co.*, 452 Pa. 77, 306 A. 2d 308 (1973).[12] As the Commonwealth Court recognized:

> "Whether the impelling force which produced the public nuisance is solely or partially that of fugitive mine water flowing into and adding to the generated water of that mine, *the conduct of Barnes & Tucker in its mining activity remains the dominant and relevant fact without which the public nuisance would not have resulted where and under the circumstances it did.*" 23 Pa. Cmwlth. at 510, 353 A. 2d at 479. (Emphasis added).

Nor, does the fact that the present condition arises only from past activities affect the appropriateness of invoking the police power to dispel the immediate dangerous condition. *See, e.g., Usery v. Turner Elkhorn Mining Co., et al.*, — U. S. —, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976); *Commonwealth ex rel. Chidsey v. Black*, 363 Pa. 231, 69 A. 2d 376 (1949). To permit appellant to avert responsibility for abating a nuisance which it created under the proposition that it may abandon its enterprise, rather than operate such enterprise within the parameters of the

12. In *Harmar*, we found that:

> "As to the definition of 'mine drainage,' we define it as waters which have been polluted as a result of the operation of a mine. The Commonwealth Court, however, was of the opinion that the fugitive water in this case was no longer mine drainage but rather 'the natural flow of "waters of the Commonwealth."' We believe that, even though the fugitive water is included within the definition of 'waters of the Commonwealth,' it is still mine drainage. Mine drainage does not cease to be mine drainage once mining has ceased in the mine from which it continues to drain." 452 Pa. at 91, 306 A. 2d at 316.

environmental regulations, would nullify the environmental policy of this Commonwealth. We cannot say that, in light of the severity of harm which may occur from the continued discharge from Mine No. 15 of the acid mine water into the waters of the Commonwealth, the remedy ordered by the Commonwealth Court is an unreasonable exercise of the police power.

The police power of the state is as comprehensive as the demands of society require under the circumstances. *See Stephens v. Bonding Association of Kentucky,* 538 S. W. 2d 580 (Ky. 1976); *People v. K. Sakai Co.,* 56 Cal. App. 3d 531, 128 Cal. Rptr. 536 (1976). Indeed, given our determination that the Commonwealth is validly employing its police power in a reasonable manner to abate the immediate public nuisance, there can be no finding of an unconstitutional "taking" by the imposition of the present abatement order, despite the impact this exercise of the police power may have on the appellant. *See, e.g., Erie Railroad Company v. Board of Public Utility Commissioners,* 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322 (1921); *Hadacheck v. Los Angeles,* 239 U. S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915); *Ramey Borough v. Commonwealth, Department of Environmental Resources,* 466 Pa. 45, 351 A. 2d 613 (1976); *Commonwealth v. Emmers,* 221 Pa. 298, 70 A. 762 (1908); *Bortz Coal Company v. Commonwealth,* 2 Pa. Cmwlth. 441, 279 A. 2d 388 (1971); *Commonwealth v. Town of Hudson,* 315 Mass. 335, 52 N. E. 2d 566 (1943). "[T]he very essence of the police power (as distinguished from the power of eminent domain) is that the deprivation of individual rights and property without compensation cannot prevent its operation, so long as its exercise is proper and reasonable." *People v. K. Sakai Co.,* 56 Cal. App. 3d 531, 538, 128 Cal. Rptr. 536, 541 (1976). This distinction was explained by the

United States Supreme Court in *Mugler v. Kansas,* 123 U. S. 623, 668-69, 8 S. Ct. 273, 301, 31 L. Ed. 205 (1887):

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

Thus, we find that restrictions or obligations imposed on the use or ownership of property to protect the public health, safety or morals from dangers threatened, if reasonably necessary to dispel the particular danger, do not constitute a taking.

It must be noted that despite ample opportunity to do so, no effort was made by appellant to offer additional evidence on remand to show that either (1) there was an alternative means of abating the nuisance which was more reasonable than that ordered by the court, or (2) the remedy imposed was unduly oppressive due to its economic impact. In fact, the Commonwealth Court found and we accept that "the only known effective abatement order which can be entered in this case is to direct the pumping and treatment of the acid mine water accumu-

lating in Mine No. 15 . . . ." [13] The appellant, therefore, has failed to carry its burden of proof on the issue of the unconstitutionality of the remedy imposed. Our review of the record and the findings of the Commonwealth Court lead us to conclude that the remedy ordered by the Commonwealth Court is neither unreasonable nor unduly oppressive. *Cf. Miller v. Schoene,* 276 U. S. 272, 48 S. Ct. 246, 72 L. Ed. 568 (1928); *Ramey Borough v. Commonwealth, Department of Environmental Resources,* 466 Pa. 45, 351 A. 2d 613 (1976).

The final decree of the Commonwealth Court is affirmed.

MANDERINO, J., did not participate in the consideration or decision of this case.

13. 23 Pa. Cmwlth. at 512, 353 A. 2d at 480.

LAWS OF PENNSYLVANIA

SESSION OF 1970

Act No. 222

AN ACT

HB 1353

Amending the act of June 22, 1937 (P. L. 1987), entitled, as amended, "An act to preserve and improve the purity of the waters of the Commonwealth for the protection of public health, animal and aquatic life, and for industrial consumption, and recreation; empowering and directing the creation of indebtedness or the issuing of non-debt revenue bonds by political subdivisions to provide works to abate pollution; providing protection of water supply; providing for the jurisdiction of courts in the enforcement thereof; requiring the approval of the Attorney General for prosecutions thereunder; providing additional remedies for abating pollution of waters; imposing certain penalties; repealing certain acts; requiring permits for the operation of coal mines, and placing responsibilities upon landowners and land occupiers," defining certain terms and redefining certain other terms, further regulating discharge of sewage and industrial waste and the operation of mines, imposing certain powers and duties on the board, the Department of Health and the Department of Mines and Mineral Industries, adding a member to the board for the purposes of this act, regulating municipal sewage and imposing certain duties on municipalities, further regulating the operation of mines, further providing for certain eminent domain authorization, further stating the responsibilities of landowners and land occupiers, setting forth enforcement procedures and providing penalties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The title and section 1, act of June 22, 1937 (P. L. 1987), known as "The Clean Streams Law," title amended August 23, 1965 (P. L. 372), and section 1 amended May 8, 1945 (P. L. 435) and August 23, 1965 (P. L. 372), are amended to read:

AN ACT

To preserve and improve the purity of the waters of the Commonwealth for the protection of public health, animal and aquatic life, and for industrial consumption, and recreation; empowering and directing the creation of indebtedness or the issuing of non-debt revenue bonds by political subdivisions to provide works to abate pollution; providing protection of water supply; providing for the jurisdiction of courts in the enforcement thereof; **[requiring the approval of the Attorney General for prosecutions thereunder;]** providing additional remedies for abating pollution of waters; imposing certain penalties; repealing certain acts; **[requiring permits for]** *regulating discharges of sewage and industrial wastes; regulating* the operation of **[coal]** mines; and placing responsibilities upon landowners and land occupiers.

Section 1. Definitions.—Be it enacted, &c., That the following words or phrases, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section.

"Board" shall be construed to mean the Sanitary Water Board in the Department of Health, or its duly constituted successor, *except for the purposes of this act, the board shall, in addition to those persons designated as members by section 439 of the act of April 9, 1929 (P. L. 177), known as "The Administrative Code of 1929," include as a member a person designated by the Chairman of the State Soil and Water Conservation Commission, which person shall have all the rights, privileges and duties, and shall receive the allowances and reimbursements established by law for members of the Sanitary Water Board.*

"Department" means the Department of Health of the Commonwealth of Pennsylvania, except that in connection

with a matter involving a bituminous strip mine or a matter involving a coal mine refuse disposal area, "department" shall mean the Department of Mines and Mineral Industries of the Commonwealth of Pennsylvania.

"Establishment" shall be construed to include any industrial establishment, mill, factory, tannery, paper or pulp mill, garage, oil refinery, oil well, boat vessel, mine, **[coal mine,]** coal colliery, breaker, **[or]** coal processing operations, **[not including]** dredging operations **[within the limits of a stream]**, *except where the dredger holds an unexpired and valid permit issued by the Pennsylvania Water and Power Resources Board prior to the effective date of this act,* quarry, and each and every other industry or plant or works **[in the operation of which industrial wastes are produced].**

"Industrial waste" shall be construed to mean any liquid, gaseous, **[or]** *radioactive,* solid *or other* substance, not sewage, resulting from any manufacturing or industry, or from any establishment, as herein defined, and mine drainage, silt, coal mine solids, rock, debris, dirt and clay from coal mines, coal collieries, breakers or other coal processing operations. *"Industrial waste" shall include all such substances whether or not generally characterized as waste.*

"Institution" shall include healing, preventive, mental, health, educational, correctional and penal institutions, almshouses, and county and city homes operated by the State, or any political subdivision thereof, and whose sewage is not admitted to a public sewer system.

"Mine" shall be construed to mean any coal mine, clay mine or other facility from which minerals are extracted from the earth.

"Municipality" **[or "municipal"]** shall be construed to include any county, **[county authority, municipal author-**

ity,] city, borough, town, township, school district, **[and]** institution, **[as above defined]** *or any authority created by any one or more of the foregoing.*

"Person" shall be construed to include any *natural* person, **[copartnership]**, association or **[private]** corporation. *Whenever used in any clause prescribing and imposing a penalty, or imposing a fine or imprisonment, or both, the term "person" shall include the members of an association and the officers of a corporation.*

"Pollution" shall be construed to mean **[noxious and deleterious substances rendering unclean the waters of the Commonwealth to the extent of being harmful or inimical to the public health, or to animal or aquatic life, or to the use of such waters for domestic water supply, or industrial purposes, or for recreation]** *contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters.* The **[Sanitary Water Board]** *board* shall determine when **[the]** *a* discharge **[of any industrial waste, or the effluent therefrom,]** constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom **[, so far as reasonably practicable and possible,]** it man be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined.

"Sewage" shall be construed to include any substance that contains any of the waste products or excrementitious

or other discharge from the bodies of human beings or animals.

"Waters of the Commonwealth" shall be construed to include any and all rivers, streams, creeks, rivulets, *impoundments, ditches, water courses, storm sewers,* lakes, dammed water, ponds, springs and all other bodies *or channels of conveyance* of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.

Section 2. Section 3 of the act is amended to read:

Section 3. Discharge of Sewage and Industrial Wastes Not a Natural Use.—The discharge of sewage or industrial waste or any **[noxious and deleterious substances]** *substance* into the waters of this Commonwealth, which **[is or may become inimical and injurious to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation]** *causes or contributes to pollution as herein defined or creates a danger of such pollution* is hereby declared not to be a reasonable or natural use of such waters, to be against public policy and to be a public nuisance.

Section 3. Section 4 of the act, added August 23, 1965 (P. L. 372), is amended to read:

Section 4. **[Findings and Declarations]** *Declaration* of Policy.—**[It is hereby determined by the General Assembly of Pennsylvania and declared as a matter of legislative findings that:**

(1) The Clean Streams Law as presently written has failed to prevent an increase in the miles of polluted water in Pennsylvania.

(2) The present Clean Streams Law contains special provisions for mine drainage that discriminate against the public interest.

(3) Mine drainage is the major cause of stream pollution in Pennsylvania and is doing immense damage to the waters of the Commonwealth.

(4) Pennsylvania, having more miles of water polluted by mine drainage than any state in the nation, has an intolerable situation which seriously jeopardizes the economic future of the Commonwealth.

(5)] *(1)* Clean, unpolluted streams are absolutely essential if Pennsylvania is to attract new manufacturing industries and to develop Pennsylvania's full share of the tourist industry [**, and**];

[**(6)**] *(2)* Clean, unpolluted water is absolutely essential if Pennsylvanians are to have adequate out of door recreational facilities in the decades ahead;

[The General Assembly of Pennsylvania therefore declares it to be the policy of the Commonwealth of Pennsylvania that:

(1)] *(3)* It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted [**, and**];

[**(2)**] *(4)* The prevention and elimination of water pollution is recognized as being directly related to the economic future of the Commonwealth; *and*

(5) The achievement of the objective herein set forth requires a comprehensive program of watershed management and control.

Section 4. The act is amended by adding after section 4, four new sections to read:

Section 5. Powers and Duties.—(a) The board and the department, in adopting rules and regulations, in establishing policy and priorities, in issuing orders or permits, and in taking any other action pursuant to this act, shall, in the exercise of sound judgment and discretion, and for the purpose of implementing the declaration of policy set forth in section 4 of this act, consider, where applicable, the following:

(1) Water quality management and pollution control in the watershed as a whole;

(2) The present and possible future uses of particular waters;

(3) The feasibility of combined or joint treatment facilities;

(4) The state of scientific and technological knowledge;

(5) The immediate and long-range economic impact upon the Commonwealth and its citizens.

(b) The board shall have the power and its duty shall be to:

(1) Formulate, adopt, promulgate and repeal such rules and regulations and issue such orders as are necessary to implement the provisions of this act.

(2) Establish policies for effective water quality control and water quality management in the Commonwealth of Pennsylvania and coordinate and be responsible for the development and implementation of comprehensive public water supply, waste management and other water quality plans.

(3) Review all Commonwealth research programs pertaining to public water supply, water quality control and water quality management: Provided, however, That this section shall not be construed to limit the authority of each department to conduct research programs and operations as authorized by law.

(4) Report from time to time to the Legislature and to the Governor on the Commonwealth's public water supply and water quality control program.

(c) The Department of Health shall have the power and its duty shall be to direct the Commonwealth's water quality control program pursuant to the provisions of this act and to the rules, regulations and policies established by the board and it shall provide such administrative services for the board as the board may require.

(d) The department shall have the power and its duty shall be to:

(1) Review and take appropriate action on all permit applications submitted pursuant to the provisions of this act and to issue, modify, suspend or revoke permits pursuant to this act and to the rules and regulations of the board. Notwithstanding any provision of this act providing for the board to issue, modify, suspend or revoke permits, the department may take such action if authorized to do so by the rules and regulations of the board.

(2) Receive and act upon complaints.

(3) Issue such orders as may be necessary to implement the provisions of this act or the rules and regulations of the board.

(4) Make such inspections of public or private property as are necessary to determine compliance with the provisions of this act, and the rules, regulations, orders or permits issued hereunder.

(5) Report to, and at the direction of, the board.

(6) Perform such other duties as the board may direct.

Section 6. Application and Permit Fees.—The department is hereby authorized to charge and collect from persons and municipalities in accordance with the rules and regulations of the board reasonable filing fees for applications filed and for permits issued.

Section 7. Administrative Procedure and Judicial Review.—(a) Any person or municipality who shall be aggrieved by any action of the department under this act shall have the right to appeal such action to the board.

(b) The board may adopt rules and regulations establishing the procedure for, and limiting the time of, the taking of such appeals. Hearings may be held before one or more members of the board or before a hearing examiner appointed by the board. When a board member serves as a hearing officer, he shall be entitled to receive an additional fifty dollars ($50.00) per diem.

(c) The board shall be subject to the provisions of the Administrative Agency Law, approved June 4, 1945 (P. L. 1388), and its amendments.

Section 8. Clean Water Fund.—(a) All fines collected under the penal provisions of this act and all civil penalties collected under section 605 of this act shall be paid into the Treasury of the Commonwealth in a special fund known as "The Clean Water Fund," which shall be administered by the Sanitary Water Board for use in the elimination of pollution.

(b) The department may, pursuant to the rules and regulations adopted by the board, in the case of a discharge which is authorized only if pursuant to a permit issued by the department, accept payments which would be paid into The Clean Water Fund in lieu of requiring the permittee to construct or operate a treatment facility. Such rules and regulations allowing such payments shall include the following:

(1) That the department finds that the use of the funds so received would provide greater benefit to citizens

of the Commonwealth and would more appropriately conform to the declarations of policy of this act than would the construction and operation of a treatment facility.

(2) That in determining the amounts of such payments, the department shall consider the cost of construction and operation of a treatment facility, the quantity and quality of the discharge, the effect of the discharge on waters of the Commonwealth, the period of time for which the discharge will continue and other relevant factors.

(3) That the permit authorizing the discharge be subject to such conditions as the department might impose, including conditions relating to procedures for the effective cessation of any pollutional discharge upon closing of the operation.

(4) That allowing the discharge will not adversely affect any treatment program which is being conducted or is contemplated in the watershed in which the discharge is located.

(5) That any such payments accepted in lieu of requiring the permittee to construct or operate a treatment facility shall be used for abatement programs or the construction of consolidated treatment facilities which would be more effective than a larger number of smaller programs or facilities, and further, that such funds shall be used only for such projects, including gathering and collection systems, on the watershed or on the body of water into which such permittee is discharging.

Section 5. Sections 202 and 203 of the act are amended to read:

Section 202. **[Extent of Applicability of Act to Existing]** Sewage Discharges.—**[Any]** *No* municipality **[discharging sewage from any sewer system owned and maintained by the municipality, and any]** *or* person

[discharging] *shall discharge or permit the discharge of* sewage *in any manner, directly or indirectly,* into **[or in such manner as to cause pollution of]** the waters of this Commonwealth **[without regard to the fact that such discharge began prior or subsequent to the twenty-second day of April, one thousand nine hundred and five, or whether such continued discharge has been by virtue of or without a permit issued by the Secretary of Health, the Commissioner of Health or the board, in accordance with the provisions of an act, approved the twenty-second day of April, one thousand nine hundred and five (Pamphlet Laws, two hundred sixty), entitled "An act to preserve the purity of the waters of the State for the protection of the public health," shall discontinue the discharge of sewage into or in such manner as to cause pollution of the waters of this Commonwealth upon the order of the board, issued pursuant to the provisions of this act, at such time as the board shall be of opinion that such discharge of sewage is or may become inimical or injurious to the public health, animal or aquatic life, or to the use of the water for domestic or industrial consumption or recreation, and on such notice, any permit heretofore granted to such municipality or person for the discharge of sewage into the waters of the Commonwealth shall be deemed to be revoked and annulled: Provided, however, That the discharge of sewage into a stream impregnated with acid coal mine drainings be permitted when the discharge of sewage does not create a condition inimical to the public interest]** *unless such discharge is authorized by the rules and regulations of the board or such person or municipality has first obtained a permit from the department. Such permit before being operative shall be recorded in the office of the recorder of deeds for the county wherein the outlet of said sewer system is located and in case the municipality or person fails or neglects to record such permit, the department shall*

cause a copy thereof to be so recorded, and shall collect the cost of recording from the municipality or person. No such permit shall be construed to permit any act otherwise forbidden by any decree, order, sentence or judgment of any court, or by the ordinances of any municipality, or by the rules and regulations of any water company supplying water to the public, or by laws relative to navigation. For the purposes of this section, a discharge of sewage into the waters of the Commonwealth shall include a discharge of sewage by a person or municipality into a sewer system or other facility owned, operated or maintained by another person or municipality and which then flows into the waters of the Commonwealth. A discharge of sewage without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the board is hereby declared to be a nuisance.

Section 2.03. **[Orders to Discontinue Existing Sewage Discharges; Nuisances.—In the case of a municipality, orders to discontinue existing discharges of sewage shall be by notice in writing (after investigation and hearing and an opportunity for all persons interested therein to be heard thereon), which notice shall be served personally or by registered mail on the corporate authorities of the municipality owning or maintaining and using the sewage system. The length of time, after receipt of the notice, within which the discharge of sewage shall be discontinued shall be stated in the notice, and shall in no case exceed two years.**

In the case of a person, orders to discontinue existing discharges of sewage shall be by notice in writing, served personally on such person or by registered mail addressed to the last known post-office address of the person discharging the sewage, and such notice shall specify a reasonable time, not exceeding one year, to be fixed by the board within which the discharge of such sewage shall be discontinued.

The continued discharge of sewage by persons or municipalities, after the expiration of the time fixed in any such notice, is hereby declared to be a nuisance, and shall be abatable and punishable as provided in this act.] *Municipal Sewage.—(a) Whether or not a municipality is required by other provisions of this act to have a permit for the discharge of sewage, if the department finds that the acquisition, construction, repair, alteration, completion, extension or operation of a sewer system or treatment facility is necessary to properly provide for the prevention of pollution or prevention of a public health nuisance, the department may order such municipality to acquire, construct, repair, alter, complete, extend, or operate a sewer system and/or treatment facility. Such order shall specify the length of time, after receipt of the order, within which such action shall be taken.*

(b) The department may from time to time order a municipality to file a report with the department pertaining to sewer systems or treatment facilities owned, operated, or maintained by such municipality or pertaining to the effect upon the waters of the Commonwealth of any sewage discharges originating from sources within the municipality. The report shall contain such plans, facts, and information which the department may require to enable it to determine whether existing sewer systems and treatment facilities are adequate to meet the present and future needs or whether the acquisition, construction, repair, alteration, completion, extension, or operation of a sewer system or treatment facility should be required to meet the objectives of this act. Whether or not such reports are required or received by the department, the department may issue appropriate orders to municipalities where such orders are found to be necessary to assure that

there will be adequate sewer systems and treatment facilities to meet present and future needs or otherwise to meet the objectives of this act. Such orders may include, but shall not be limited to, orders requiring municipalities to undertake studies, to prepare and submit plans, to acquire, construct, repair, alter, complete, extend, or operate a sewer system or treatment facility, or to negotiate with other municipalities for combined or joint sewer systems or treatment facilities. Such orders may prohibit sewer system extensions, additional connections, or any other action that would result in an increase in the sewage that would be discharged into an existing sewer system or treatment facility.

Section 6. Sections 204, 205, 206 and 208 of the act are repealed.

Section 7. Sections 210 and 301 of the act are amended to read:

Section 210. **[Municipal Financing of Pollution Abatement.—Any municipality upon whom an order of the board is served to abate its discharge of untreated or inadequately treated sewage, shall, unless said order to abate said discharge be reversed on appeal, take steps for the acquisition or construction of a sewer or sewerage system or sewage treatment works, or both, or for the repair, alteration, extension or completion of an existing sewer, sewerage system or sewage treatment works, or both, as may be necessary for the treatment of its sewage, in compliance with the order of the board. The cost of the acquisition, construction, repair, alteration, completion or extension of the sewer, sewerage system or sewage treatment works, as may be necessary to comply with said order, shall be paid out of funds on hand available for such purpose, or out of the general funds of such municipality not otherwise appropriated. If there be no sufficient funds on hand**

or unappropriated, then the necessary funds shall be raised by the issuance of bonds, such bond issue to be subject only to the approval of the Department of Internal Affairs. If the estimated cost of the steps necessary to be taken by such municipality to comply with such order is such that the bond issue, necessary to finance such project, would not raise the total outstanding bonded indebtedness of such municipality in excess of the constitutional limit imposed upon such indebtedness by the Constitution of this Commonwealth, then, and in that event, the necessary bonds may be issued as a direct obligation of such municipality and retired pursuant to general law governing the issue of such bonds, if the electors of the municipality shall vote in favor of the increase in indebtedness where the consent of the electors is required. If the amount of such bonds necessary to be issued would raise the total outstanding bonded indebtedness of such municipality above such constitutional limitation on such indebtedness, or if the consent of the electors cannot be secured, or if such municipality by its corporate authorities shall determine against the issuance of direct obligation bonds, then such municipality shall be requested to issue non-debt revenue bonds and provide for the payment of the interest and principal of such bonds from funds to be raised by imposing a sewer rental or charge, in accordance with and as authorized by the act, approved the eighteenth day of July, one thousand nine hundred and thirty-five (Pamphlet Laws, twelve hundred eighty-six), entitled "An act empowering cities (except cities of the first class), boroughs, incorporated towns, and townships to charge and collect annual rentals for the use of certain sewage systems, and treatment works, including charges for operation, inspection, maintenance, repair, depreciation, and the amortization of indebtedness and interest thereon," or other legislation relating to the imposition and collection of such rentals and charges.

The funds made available by the issuance of either direct obligation bonds or revenue bonds secured by rental charges as herein provided, shall constitute a sanitary fund, and shall be used for no other purpose than for carrying out such order or orders of the board.

The Attorney General, at the instance of the board, may enforce this provision of the act by action of mandamus] *Duties of Municipalities.—It shall be the duty of the corporate authorities of a municipality upon whom an order is issued pursuant to section 203 of this act to proceed diligently in compliance with such order. If the corporate authorities fail to proceed diligently, or if the municipality fails to comply with the order within the specified time, the corporate authorities shall be guilty of contempt and shall be punished by the court in an appropriate manner and, for this purpose, application may be made by the Attorney General to the Court of Common Pleas of Dauphin County, until such time as the Commonwealth Court comes into existence and thereafter the Commonwealth Court instead of said Court of Common Pleas of Dauphin County, or to the court of common pleas of the county wherein the municipality is situated, which courts are hereby given jurisdiction.*

Section 301. Prohibition Against Discharge of Industrial Wastes.—No person *or municipality* shall place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any industrial wastes, except as hereinafter provided in this act.

Section 8. Sections 302 and 306 of the act are repealed.

Section 9. Section 307 of the act, amended May 8, 1945 (P. L. 435), is amended to read:

Section 307. **[Regulation of Establishments Erected or Opened or Reopened in the Future]** *Industrial Waste Discharges.*—No person *or municipality* shall **[hereafter erect, construct or open, or reopen or operate, any establishment which, in its operation, results in the]** discharge *or permit the discharge* of industrial wastes **[which would flow or be discharged]** *in any manner, directly or indirectly,* into any of the waters of the Commonwealth **[and thereby cause a pollution of the same,]** unless such **[person shall first provide proper and adequate treatment works for the treatment of such industrial wastes, approved by the board, so that if and when flowing or discharged into the waters of the Commonwealth the effluent thereof shall not be inimical or injurious to the public health or to animal or aquatic life, or prevent the use of water for domestic, industrial or recreational pruposes, except when, in the opinion of the board, such industrial waste is not inimical or injurious to the public health or to animal or aquatic life, or to the use of the water for domestic, industrial or recreational purposes, and shall grant a permit for the discharge of such industrial waste into the waters of the Commonwealth. But no permit shall ever be issued by the board authorizing the discharge of untreated industrial waste into the clean waters of the State as above defined]** *discharge is authorized by the rules and regulations of the board or such person or municipality has first obtained a permit from the department. For the purposes of this section, a discharge of industrial wastes into the waters of the Commonwealth shall include a discharge of industrial wastes by a person or municipality into a sewer system or other facility owned, operated or maintained by another person or municipality and which then flows into the waters of the Commonwealth.* Public notice of every application for a permit under this section shall be given by notice published in a newspaper of general circulation,

published in a county where the permit is applied for, once a week for four weeks. *A discharge of industrial wastes without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the board is hereby declared to be a nuisance.* **[But any such permit shall be revocable or subject to modification and change by the board at any time thereafter upon reasonable notice, served personally or by registered mail addressed to the last known post-office address of the holder of the permit, and the owner or operator of such establishment may be required to install treatment works, approved by the board, for the treatment of such industrial waste, or for the deposition of solids in such industrial waste in the manner and to the extent as the board may require. The discharge of industrial waste into any of the waters of the Commonwealth from any such establishment contrary to the provisions of this section, or without a permit, or after the time fixed in the notice of the board when a permit is revoked, or in violation of any modification thereof, is hereby declared to be a nuisance and to be punishable and abatable as herein provided.]**

Section 10. Section 308 of the act is amended to read:

Section 308. Approval of Plans, Designs, and Relevant Data by the **[Sanitary Water Board]** *Department.*—All plans, designs, and relevant data for the erection and construction of treatment works by any person *or municipality* for the treatment of industrial wastes shall be submitted to the **[board]** *department* for its approval before the works are constructed or erected. Any such construction or erection which has not been approved by the **[board]** *department* by written permit, or any treatment works not maintained or operated in accordance with the

rules and regulations of the board, is hereby declared *to be* a nuisance **[and to be punishable and abatable as herein provided].**

Section 11. Section 309 of the act is repealed.

Section 11.1. Section 314 of the act, added April 20, 1956 (P. L. 1479), is amended to read:

Section 314. Authorizing Certain Corporations to Acquire Interests in Land by Eminent Domain.—Whenever the Sanitary Water Board shall direct any corporation to cease discharging industrial waste into any waters of the Commonwealth, pursuant to the public policy set forth in this act, and such directive would materially affect the operations of that corporation's business, then such corporation if not otherwise vested with the right of eminent domain may make application to the board for an order, finding that the use by the applicant of a specified interest in a specifically described piece of land is necessary in connection with the elimination, reduction or control of the pollution of any of the waters of this Commonwealth. For the purposes of this act, such corporations are vested with the right of eminent domain which shall be exercised only upon authorization of the board, in which event they shall proceed in the manner and form set forth in **[section forty-one, act of April twenty-nine, one thousand eight hundred seventy-four (Pamphlet Laws 73), and its amendments]** *the "Eminent Domain Code," act of June 22, 1964 (P. L. 84), as amended:* Provided, That no property devoted to a public use or owned by a public utility or used as a place of public worship or used for burial purposes shall be taken under the right of eminent domain: And provided further, That where any existing public street or road is vacated by any municipality in order to facilitate any undertaking in connection with land acquired under the right of eminent

domain as provided for above, the corporation acquiring such land shall reimburse all public utilities, *municipalities and municipality authorities* for the costs of relocating and reconstructing their facilities necessitated by the closing of any such street or road.

In the event the application by the corporation to the board is denied, then the corporation so applying may appeal to the court of common pleas in the county where the specified land in which the specified interest is sought to be obtained by eminent domain is situated, and the court shall be empowered to review all questions of fact as well as of law.

Section 12. Sections 315 and 316 of the act, added August 23, 1965 (P. L. 372), are amended to read:

Section 315. **[Permits for Operation of Coal Mines.—**
(a) Before any coal mine is opened, reopened, or continued in operation, an application for a permit approving the proposed drainage and disposal of industrial wastes shall be submitted to the Sanitary Water Board. The application shall contain complete drainage plans including any restoration measures that will be taken after operations have ceased and such other information as the board by regulation shall require.

(b) It shall be unlawful to open, reopen, or continue in operation any coal mine, or to change or alter any approved plan of drainage and disposal of industrial wastes, unless and until the board, after consultation with the Department of Mines and Mineral Industries, has issued a permit approving the plan or change of plan. A permit shall not be issued if the board shall be of the opinion that the discharge from the mine would be or become inimical or injurious to the public health, animal or aquatic life, or to the use of the water for domestic or industrial consumption or recreation. In issuing a permit the board may

impose such conditions as are necessary to protect the waters of the Commonwealth. The permittee shall comply with such permit conditions and with the rules and regulations of the board.

(c) The board may modify, suspend or revoke any permit issued pursuant to this section. Such action may be taken if the board finds that a discharge from the mine is causing or is likely to cause pollution to waters of the Commonwealth or if it finds that the operator is in violation of any provision of this act or any rule or regulation of the Sanitary Water Board. An order of the board modifying, revoking or suspending a permit shall take effect upon notice from the board, unless the order specifies otherwise. Any party aggrieved by such order shall be given the opportunity to appear before the board at a hearing at which the board shall reconsider its order and issue an adjudication, from which the aggrieved party may appeal in the manner provided by the "Administrative Agency Law," act of June 4, 1945 (P. L. 1388), as amended. The right of the board to suspend or revoke a permit is in addition to any penalty which may be imposed pursuant to this act.

(d) Any permit approving the drainage and disposal of industrial wastes from a coal mine and issued by the board prior to the effective date of this act shall be deemed to be a permit issued pursuant to this section. The permit shall be valid for one year from the effective date of this act or for such additional period as the board might allow. Nothing herein shall limit the board's power to modify, suspend, or revoke any such permit under the provisions of subsection (c) of this section] *Operation of Mines.—(a) No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by*

the rules and regulations of the board or such person or municipality has first obtained a permit from the department. Operation of the mine shall include preparatory work in connection with the opening or reopening of a mine, backfilling, sealing, and other closing procedures, and any other work done on land or water in connection with the mine. A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1, 1966, under circumstances requiring a permit from the Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P. L. 372). The operation of any mine or the allowing of any discharge without a permit or contrary to the terms or conditions of a permit or contrary to the rules and regulations of the board, is hereby declared to be a nuisance. Whenever a permit is requested to be issued pursuant to this subsection, and such permit is requested for permission to operate any mining operations, the city, borough, incorporated town or township in which the operation is to be conducted shall be notified by registered mail of the request, at least ten days before the issuance of the permit or before a hearing on the issuance, whichever is first.

(b) The department may require an applicant for a permit to operate a mine, or a permittee holding a permit to operate a mine under the provisions of this section, to post a bond or bonds in favor of the Commonwealth of Pennsylvania and with good and sufficient sureties acceptable to the department to insure that there will be compliance with the law, the rules and regulations of the board, and the provisions and conditions of such permit including conditions pertaining to restoration measures or other provisions insuring that there will be no polluting

discharge after mining operations have ceased. The department shall establish the amount of the bond required for each operation and may, from time to time, increase or decrease such amount. Liability under each bond shall continue until such time as the department determines that there is no further significant risk of a pollutional discharge. The failure to post a bond required by the department shall be sufficient cause for withholding the issuance of a permit or for the revocation of an existing permit.

Section 316. Responsibilities of Landowners and Land Occupiers **[to allow access]**.

Whenever the Sanitary Water Board finds that pollution **[of waters of the Commonwealth]** *or a danger of pollution* is resulting from a condition which exists on land in the Commonwealth **[and that the owner or occupier of such land has refused to allow a mine operator or other person or an appropriate agency of the Commonwealth access to the land to take whatever measures are necessary to eliminate the pollution,]** the board may order the landowner or occupier to **[allow such access]** *correct the condition in a manner satisfactory to the board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.*

For the purpose of collecting or recovering the expense involved in correcting the condition, the board may assess the amount due in the same manner as civil penalties are assessed under the provisions of section 605 of this act: Provided, however, That if the board finds that the condition causing pollution or a danger of pollution resulted from mining operations conducted prior to January

1, 1966, or, if subsequent to January 1, 1966, under circumstances which did not require a permit from the Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P. L. 372), then the amount assessed shall be limited to the increase in the value of the property as a result of the correction of the condition.

If the board finds that the pollution or danger of pollution results from an act of God in the form of sediment from land for which a complete conservation plan has been developed by the local soil and water conservation district and the Soil Conservation Service, U. S. D. A. and the plan has been fully implemented and maintained, the landowner shall be excluded from the penalties of this act.

Section 13. Section 317 of the act is repealed.

Section 14. The title of Article IV and sections 401 and 402 of the act are amended to read:

ARTICLE IV

[PETTY] *OTHER POLLUTIONS AND POTENTIAL* POLLUTION

Section 401. [Petty Pollutions Prohibited.—It shall be unlawful for any person to put or place into any of the waters of the Commonwealth any explosive, or to put or to allow any substance of any kind or character injurious or inimical to the public health or to animal or aquatic life, or to the uses of water for industrial purposes or for recreation, to be turned into or to run or flow or wash or to be emptied into any of the waters of the Commonwealth.

Any person violating the provisions of this section shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of not less than one hundred dollars nor more than five hundred dollars, and, in default

of the payment of such fine and costs of prosecution, the person, or if such person be an association or copartnership, then the members thereof, or if such person be a corporation, then the officers thereof, shall be imprisoned in the county jail for a period of sixty days.

Any person who shall continue to violate the provisions of this section, after conviction in a summary proceeding as above provided, shall be guilty of a misdemeanor, and, upon conviction thereof in the court of quarter sessions, shall be sentenced to pay a fine of not less than five hundred dollars nor more than one thousand dollars, and such person, or if such person be an association or copartnership, then the members thereof, or if such person be a corporation, then the officers thereof, shall be imprisoned in the county jail for a period of not less than three months nor more than one year. Each day during which this section is violated shall constitute a separate offense.

Nothing contained in this section shall be construed to apply to any sewage or industrial waste the discharge of which is regulated or prohibited by the preceding sections of this act, but this section shall apply to explosives, and to all other substances injurious or inimical to the public health or animal or aquatic life, or to the use of the water for domestic, industrial or recreational purposes, and to any sewage or industrial waste the discharge of which is not regulated or prohibited by the preceding sections of this act. This section shall not be construed to prohibit the use of explosives for engineering purposes when a written permit has been given therefor by proper National, State or municipal authorities] *Prohibition Against Other Pollutions.—It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from*

property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.

Section 402. **[Abatement of Petty Pollutions.—The violation of any of the provisions of the preceding section of this act is hereby declared to constitute a nuisance and to be abatable as herein provided]** *Potential Pollution.—(a) Whenever the board finds that any activity, not otherwise requiring a permit under this act, including but not limited to the impounding, handling, storage, transportation, processing or disposing of materials or substances, creates a danger of pollution of the waters of the Commonwealth or that regulation of the activity is necessary to avoid such pollution, the board may, by rule or regulation, require that such activity be conducted only pursuant to a permit issued by the department or may otherwise establish the conditions under which such activity shall be conducted, or the board may issue an order to a person or municipality regulating a particular activity. Rules and regulations adopted by the board pursuant to this section shall give the persons or municipalities affected a reasonable period of time to apply for and obtain any permits required by such rules and regulations.*

(b) Whenever a permit is required by rules and regulations issued pursuant to this section, it shall be unlawful for a person or municipality to conduct the activity regulated except pursuant to a permit issued by the department. Conducting such activity without a permit, or contrary to the terms or conditions of a permit or conducting an activity contrary to the rules and regulations of the board or conducting an activity contrary to an order issued by the department, is hereby declared to be a nuisance.

Section 15. Section 403 of the act is repealed.

Section 16. The title of Article VI and sections 601, 602, 605 and 609 of the act are amended to read:

ARTICLE VI

PROCEDURE *AND ENFORCEMENT*

Section 601. Abatement of **[Pollutions]** *Nuisances; Restraining Violations.—(a)* **[All pollutions hereinbefore declared to be nuisances or maintained contrary to the provisions of this act,]** *Any activity or condition declared by this act to be a nuisance,* shall be abatable in the manner **[now]** provided by law or equity for the abatement of public nuisances. In addition, suits to abate **[pollution of any of the waters of the Commonwealth]** *such nuisances or suits to restrain or prevent any violation of this act* may be instituted in equity or at law in the name of the Commonwealth upon relation of the Attorney General, or upon relation of any district attorney of any county, or upon relation of the solicitor of any municipality affected, after notice has first been served upon the Attorney General of the intention of the district attorney or solicitor to so proceed. Such proceedings may be prosecuted in the **[court of common pleas of Dauphin County]** *Commonwealth Court,* or in the court of common pleas of the county where the **[nuisance has been or is being committed, or of any county through which or along the borders of which flows the water into which such pollution has been discharged at any point above]** *activity has taken place, the condition exists, or the public affected,* and to that end jurisdiction is hereby conferred in law and equity upon such courts: Provided, however, That no action shall be brought by such district attorney or solicitor against any municipality discharging sewage under a permit of the board heretofore issued or

hereafter issued under this act: And provided further, That, except in cases of emergency where, in the opinion of the court, the exigencies of the cases require immediate abatement of said nuisances, the court may, in its decree, fix a reasonable time during which the person or municipality responsible for the nuisances may make provision for the abatement of the same.

(b) In cases where the circumstances require it or the public health is endangered, a mandatory preliminary injunction or special injunction may be issued upon the terms prescribed by the court, notice of the application therefor having been given to the defendant in accordance with the rules of equity practice, and in any such case the Attorney General, the district attorney or the solicitor of any municipality shall not be required to give bond.

Section 602. **[Preliminary Injunctions.—In cases where the circumstances require it or the public health is endangered, a mandatory preliminary injunction or special injunction may be issued upon the terms prescribed by the court, notice of the application therefor having been given to the defendant in accordance with the rules of equity practice, and in any such case the Attorney General, the district attorney or the solicitor of any municipality shall not be required to give bond]** *Penalties.—(a) Any person or municipality who violates any provision of this act or any rule or regulation or order of the board or any order of the department issued pursuant to this act is guilty of a summary offense and, upon conviction, shall be subject to a fine or not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) for each separate offense, and, in default of the payment of such fine, the person, or if such person be a partnership, then the members thereof, or if such person be a corporation or association, then the officers, members, agents, servants or employes thereof, shall be imprisoned in the county jail for a period of sixty days.*

(b) Any person or municipality who, after a conviction in a summary proceeding within two years as above provided, violates any provision of this act or any rule or regulation or order of the board or any order of the department issued pursuant to this act is guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not less than one hundred dollars ($100) nor more than five thousand dollars ($5,000) for each separate offense or to imprisonment in the county jail for a period of not more than one year, or both. In the case of a partnership the members thereof, and in the case of a corporation or an association the officers, members, agents, servants or employes thereof, may be subject to any such sentence of imprisonment.

(c) Each day of continued violation of any provision of this act or any rule or regulation or order of the board or any order of the department issued pursuant to this act shall constitute a separate offense under subsections (a) and (b) of this section.

Section 605. **[Appeals.—Any order, decision, rule or regulation made by the board shall be subject to appeal to the court of common pleas of Dauphin County, within thirty days from its entry, by any person or municipality, but in such appeal, the decision, rule or regulation of the board shall be prima facie evidence of the correctness thereof, and the burden to establish the incorrectness thereof shall be upon the appellant. Said court may affirm or modify any such order, decision, rule or regulation if it be established by the appellant that the discharge of sewage or industrial waste, or the erection, maintenance or operation of any treatment works, is not nor likely to**

become inimical or injurious to the public health or to animal or aquatic life, or to the use of the water for domestic, industrial or recreational purposes, and if the court so finds, it may set aside such order, decision, rule or regulation of the board. Any order (other than an order to discontinue the discharge of industrial waste), decision, rule or regulation appealed from shall not be superseded by the appeal, but shall be in force until the order of the court is made, as above provided. The setting aside of any order or decision of the board by the court upon any such appeal shall not prevent or preclude said board from again instituting subsequent proceedings against the same person or municipality when, in its opinion, the public health is endangered, or animal or aquatic life destroyed, or water rendered unfit for domestic, industrial or recreational purposes, subject to appeal as above provided] *Civil Penalties.—In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act or a rule or regulation of the board or an order of the department, the board, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000), plus five hundred dollars ($500) for each day of continued violation. In determining the amount of the civil penalty the board shall consider the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors. It shall be payable to the Commonwealth of Pennsylvania and shall be collectible in any manner provided at law for the collection of debts. If any person liable to pay any such penalty neglects or refuses to pay the same after demand, the amount, together with interest and any costs that may*

accrue, shall be a lien in favor of the Commonwealth upon the property, both real and personal, of such person but only after same has been entered and docketed of record by the prothonotary of the county where such is situated. The board may, at any time, transmit to the prothonotaries of the respective counties certified copies of all such liens, and it shall be the duty of each prothonotary to enter and docket the same of record in his office, and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof.

Section 609. **[Application and Permit Fees.—The board is hereby authorized to fix and collect from persons and municipalities a reasonable filing fee for applications filed and for permits issued]** *Withholding of Permit.—The department may withhold the issuance of any permit required by this act when the applicant has been found to be in violation of any relevant provision of this act, or of any relevant rule, regulation or order of the board, or of any relevant order of the department, and that the said violation demonstrates a lack of ability or intention on the part of the applicant to comply with the law or with the conditions of the permit sought. In such case, the department shall forthwith notify the applicant in writing of the grounds for withholding issuance of the permit, setting forth in reasonable detail the nature of the violation and affording the applicant a prompt opportunity to appear before the board and be heard. Should the applicant wish to do so, he may offer evidence of his ability and intention to comply with the provisions of this act and the rules, regulations and orders of the board and of the conditions of the permit notwithstanding such violation, and should the department be satisfied, it may in its discretion grant said permit under such terms and conditions as it may deem necessary.*

Section 17. The act is amended by adding after section 609, a new section to read:

Section 610. Enforcement Orders.—The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include, but shall not be limited to, orders modifying, suspending or revoking permits and orders requiring persons or municipalities to cease operations of an establishment which, in the course of its operation, has a discharge which is in violation of any provision of this act. Such an order may be issued if the department finds that a condition existing in or on the operation involved is causing or is creating a danger of pollution of the waters of the Commonwealth, or if it finds that the permittee, or any person or municipality is in violation of any relevant provision of this act, or of any relevant rule, regulation or order of the board or relevant order of the department: Provided, however, That an order affecting an operation not directly related to the condition or violation in question, may be issued only if the department finds that the other enforcement procedures, penalties and remedies available under this act would probably not be adequate to effect prompt or effective correction of the condition or violation. The department may, in its order, require compliance with such conditions as are necessary to prevent or abate pollution or effect the purposes of this act. An order issued under this section shall take effect upon notice, unless the order specifies otherwise. An appeal to the board of the department's order shall not act as a supersedeas: Provided, however, That, upon application and for cause shown, the board or the Commonwealth Court may issue such a supersedeas. The right of the department to issue an order under this section is in addition to any penalty which may be imposed pursuant to this act. The failure to comply with any such order is hereby declared to be a nuisance.

Section 18. All rules, regulations, orders and permits, heretofore adopted or issued by the Sanitary Water Board or the Department of Health of the Commonwealth of Pennsylvania under the provisions of law repealed by this act, shall continue in force with the same effect as if such provisions of law had not been repealed subject, however, to such modification, change or annulment as may be *deemed necessary by the Sanitary Water Board or the* Department of Health or the Department of Mines and Mineral Industries in order to comply with the provisions of this act.

Section 19. The provisions of this act shall not affect any suit or prosecution pending or to be instituted to enforce any right or penalty or punish any offense under the authority of any act of Assembly or part thereof repealed by this act.

Section 20. This act shall take effect immediately.

APPROVED—The 31st day of July, A. D. 1970.

RAYMOND P. SHAFER

The foregoing is a true and correct copy of Act of the General Assembly No. 222.

ISSAC I. KELLY, JR.
Secretary of the Commonwealth.

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

—

No. 23 May Term, 1977,
Consolidated with No. 14 May Term, 1977

—

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

BARNES & TUCKER COMPANY,
Appellant.

—

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

—

Notice is hereby given that Barnes & Tucker Company, the above named appellant, hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Court of Pennsylvania affirming the Order of the Commonwealth Court of Pennsylvania at No. 896-A, Transfer Docket 1970, entered in this action on February 28, 1977, reargument denied on April 6, 1977.

This appeal is taken pursuant to 28 U. S. C. § 1257(1).

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Of Counsel.

Dated: June 30, 1977

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

—

No. 23 May Term, 1977,

Consolidated with No. 14 May Term, 1977

—

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

BARNES & TUCKER COMPANY,

Appellant.

—

CERTIFICATE OF SERVICE

—

James D. Crawford, attorney for Barnes & Tucker Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on June 29, 1977, a copy of the foregoing notice of appeal was served upon K. W. James Rochow, Assistant Attorney General, counsel for the Commonwealth of Pennsylvania, appellee, by mailing a copy, first class mail, postage prepaid, to him at the Office of Enforcement, Department of Environmental Resources, P. O. Box 2357, Harrisburg, Pennsylvania 17120 and that he is the only person required to be served.

James D. Crawford
Attorney for Appellant

Dated: June 30, 1977

In the Supreme Court of the United States

October Term, 1977

No. 77-44

BARNES & TUCKER COMPANY,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal From the Supreme Court of Pennsylvania, Middle District.

MOTION TO DISMISS OR AFFIRM

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October Term, 1977
No. 77-44

BARNES & TUCKER COMPANY,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal From The Supreme Court Of Pennsylvania,
Middle District

MOTION TO DISMISS OR AFFIRM

The Commonwealth of Pennsylvania, Appellee moves the Court to dismiss the instant Appeal or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania without further argument on the ground that the instant Appeal presents no substantial federal questions.

COUNTER-STATEMENT OF JURISDICTION

The Jurisdictional Statement of Barnes and Tucker Company ("Barnes & Tucker"), Appellant, fails to indicate that one of the independent bases of Barnes & Tucker's liability to abate the polluting discharge from its Mine No. 15 is common law public nuisance (*Commonwealth v. Barnes & Tucker*, 455, Pa. 392, 408, 319 A.2d 871, 880 (1974); A. 85).[1]

As the Pennsylvania Supreme Court found, the discharge of acid mine drainage into Pennsylvania's waters has constituted a public nuisance under Pennsylvania common law at all times (455 Pa. at 417, 319 A.2d at 884; A. 94).

[1] References to "A" page numbers are to the Appendix to Barnes & Tucker's Jurisdictional Statement. In the interest of succinctness, citations to the opinions in this case below will be by volume and page only.

COUNTER-STATEMENT OF QUESTION PRESENTED

Do not Pennsylvania's common law and statutory law declarations that the post-mining discharge of acid mine drainage is a public nuisance which must be abated by the operator who caused it constitute a valid exercise of the police power necessary to protect Pennsylvania's public and industry from Pennsylvania's worst water pollution problem?

COUNTER-STATEMENT OF THE CASE

Among the facts which Barnes & Tucker fails to include in its Statement of the Case are the following:

1. Despite the repeated opportunities afforded by the Pennsylvania courts to do so, Barnes & Tucker failed to introduce any evidence whatsoever regarding the economic impact upon it of the requirement that it abate the polluting discharge from its Mine No. 15 into the West Branch of the Susquehanna River (23 Pa. Commonwealth Ct. 496, at 511-512, 353 A.2d at 480; A. 113-114; 371 A.2d at 468; A. 129-130).

2. One of the independent bases of Barnes & Tucker's liability in this case is common law public nuisance (455 Pa. at 408, 319 A.2d at 880; A. 85).

3. The discharge of acid mine drainage has constituted a public nuisance under Pennsylvania common law at all times (455 Pa. at 417, 319 A.2d at 884; A. 94).

4. Barnes & Tucker's conduct in its mining activity caused the polluting discharge from its Mine No. 15 (23 Pa. Commonwealth Ct. at 510, 353 A.2d at 479; A. 111; 371 A.2d at 466-467; A. 127).

5. The discharge from Mine No. 15 first occurred from a borehole which Barnes & Tucker never sealed, despite the fact that Barnes & Tucker represented under oath to the Commonwealth that it would seal all such openings with concrete to prevent post-mining discharges (9 Pa. Commonwealth Ct. 1, at 15, 303 A.2d at 551; A. 22-23, 26-27).

6. Since 1960, Barnes & Tucker's active mining permits did not allow any discharge of acid mine drainage—untreated or treated—into the West Branch of the Susquehanna River (455 Pa. at 415, 319 A.2d at 883-884; A. 92).

7. Barnes & Tucker failed to present any evidence concerning alternative methods of abating its discharge from Mine No. 15 (371 A.2d 461, at 468; A. 129-130). Moreover, Barnes & Tucker at no time in this case challenged the appropriateness of the relief—the Duman Dam facility—to abate the discharge from its Mine No. 15. To the contrary, Barnes & Tucker itself chose the Duman Dam facility as the most appropriate means of abating the polluting discharge from Mine No. 15, constructed it according to the terms of a stipulation it entered into with the Commonwealth and continues to operate it (371 A.2d at 464; A. 121-122).

8. Both decisions of the Pennsylvania Supreme Court ("Pa. Supreme Court") in this case were without dissent.[2]

[2] Mr. Justice Manderino did not participate in either decision.

ARGUMENT

I. PENNSYLVANIA'S REQUIREMENT THAT AN OPERATOR ABATE ITS POST-MINING DISCHARGE OF ACID MINE DRAINAGE IN ORDER TO PROTECT PENNSYLVANIA'S INDUSTRY AND PUBLIC FROM THE WORST SOURCE OF WATER POLLUTION IN THE STATE IS A VALID EXERCISE OF PENNSYLVANIA'S POLICE POWER

A. Pennsylvania Has a Compelling Interest in the Abatement of Discharges of Acid Mine Drainage—Especially Post-Mining Discharges From Deep Mines—Because They Constitute Pennsylvania's Worst Water Pollution Problem

The discharge of acid mine drainage[3] into Pennsylvania's waters constitutes Pennsylvania's worst water pollu-

[3] "Acid mine drainage is primarily the result of acid and iron pollutants formed when the pyrite and marcasite (iron disulfides) present in coalbeds are exposed to the atmosphere and water. When coal is extracted, the pyrites in the mine are exposed to air and water. A chemical reaction occurs and the pyrite is oxidized to form ferrous sulfate and sulfuric acid. The ferrous sulfate and sulfuric acid thus formed are washed off the coal mine walls into the ground water flowing through the mine, where further hydrolizing or oxidizing occurs and ferric iron and additional acids are formed. The ferrous sulfate is then hydrolized forming ferrous iron. Next the ferrous iron is oxidized to the ferric state and additional acidity results.

tion problem. *Commonwealth v. Harmar and Pittsburgh Coal Companies*, 452 Pa. 77, 84, 306 A.2d 308, 312-313 (1973) (*appeals dismissed* for want of substantial federal questions, 415 U.S. 903); *Commonwealth v. Barnes & Tucker*, 455 Pa. 392, 412-413, 319 A.2d 871, 882 (1974); A. 89-90; *Commonwealth v. Barnes & Tucker*, Pa. , 371 A.2d 461, 465-466 (1977); A. 125-126; *see* Appalachian Regional Commission's Report, *Acid Mine Drainage in Appalachia*, H.R. Doc. 91-180 (91st Cong., 1st Sess. 1969).[4]

Indeed, Pennsylvania has the severest acid mine drainage pollution problem in the entire country and has almost 2,500 miles of streams polluted by acid mine drainage. *Id.* Moreover, Pennsylvania's coal has the highest pollution potential of any coal in the world.

Among the damage which acid mine drainage causes in Pennsylvania is destruction of the assimilative waste

"The end result is that the receiving streams are loaded with sulfates, acid and iron hydroxides, as well as such dissolved minerals as aluminum, calcium, magnesium, manganese and ferrous iron. . . .

" 'Acid drainage affects the surrounding environment by reducing the pH of both soil and streams to an extent that it is not conducive to most vegetable growth. For example, if the pH of a stream is reduced below 5.0, the stream is incapable of supporting fish. This type of pollution is responsible for a major share of the economic damage resulting from coal mine water pollution.' [citation omitted]" *Commonwealth v. Barnes & Tucker*, —— Pa. ——, 371 A.2d 461, 465-466, n. 9 (1977); A. 125.

[4] Even Pennsylvania's Constitution—Art. I, §27—declares a public interest in the abatement of acid mine drainage. *See Harmar*, 452 Pa. at 93-94, 306 A.2d at 317; 455 Pa. at 412-413, 319 A.2d at 882; A. 90.

capacity of streams; destruction of acquatic plants and animals; damage to navigation—including boats, barges and dams; erosion of the concrete in bridge abutments and metal culverts; and destruction of sources of water for the public and industry. *Id.*

The cost to Pennsylvania's public and industry of acid mine drainage pollution is astronomically high and includes the cost of industrial and municipal water treatment. *Id.*

The worst source of acid mine drainage pollution in Pennsylvania is the very type of source involved in this case—post-mining discharges from deep mines. As the Pennsylvania Supreme Court noted:

> " 'Underground mines produce 71.3% of all mine acid drainage, although they constitute only 58% of the number of individual sources. Inactive underground mines, constituting 53% of the sources, contribute 52.5% of the total acid mine drainage. Active underground mines on the other hand, contribute 18.8% of total acid mine drainage, although they constitute only 5% of the total sources. Thus not only is the acid mine drainage problem concentrated geographically, it is also concentrated in one segment of the mining industry.' [citations omitted] . . . One study has estimated that approximately seventy-eight percent of all acid mine drainage in Appalachia has been estimated to flow from abandoned or inactive mines. Comment, Environmental Law—Acid Mine Drainage, 76 W. Va. L. Rev. 508, 520 (1973-74), citing Bituminious Coal Research, Inc., Studies on Limestone Treatment." 371 A.2d at 466 n. 10; A. 125-126.

B. Barnes & Tucker's Failure To Introduce Evidence Showing the Impact Upon It of Pennsylvania's Requirement That Operators Abate Their Post-Mining Discharges Precludes Barnes & Tucker From Prevailing on the Merits

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It is well-settled that the strongest possible presumption stands in favor of the validity of police power regulation and that the burden of proof consequently is very heavy upon those who would challenge such regulation. *E.g., North Dakota Pharmacy B'd. v. Snyder's Stores,* 414 U.S. 156, 164-167.

Barnes & Tucker, despite being afforded repeated opportunities to do so by the Pennsylvania courts, completely failed to present any evidence to meet its very heavy burden of proof in support of its claims of unconstitutionality. Most notably, Barnes & Tucker failed to introduce any evidence concerning the economic impact upon it (much less the conglomerate of which it is a part) of the requirement that it abate the polluting discharge of acid mine drainage from its Mine No. 15. 23 Pa. Commonwealth Ct. at 511-512, 353 A.2d at 480; A. 113-114; 371 A.2d at 468; A. 129-130. Barnes & Tucker also failed to introduce any evidence concerning alternative methods of abatement. 371 A.2d at 468; A. 129-130.

Based on Barnes & Tucker's complete failure to adduce evidence in support of its contention that it was unconstitutional for Pennsylvania to require it to abate its Mine No. 15 discharge, the chancellor made the following finding, which the Pa. Supreme Court affirmed:

"In this case, however, we have no way of measuring such economic impact. Although afforded an opportunity on remand to introduce such additional evidence as it deemed relevant to the issues on remand, Barnes & Tucker did not see fit to introduce any new evidence into the case. We are thus without knowledge of its capital structure, assets and liabilities or its profits or losses, if any.

"We know only the monthly costs, now accumulated over several years, of operating the Duman Dam facility to pump and treat the mine water accumulating in Mine No. 15, which has been closed and remains closed to this date. On such a record Barnes & Tucker would have us declare that the costs of operating the Duman Dam facility at its expense as the only presently known method of abating the nuisance in question is the equivalent of a taking of its property or as beyond the parameters of reason, thereby effectively isolating this cost from the relative economic impact thereof upon its corporate assets and profits. No precedent is cited for such a convenient insulation of corporate assets from its responsibility and attendant costs of abating this public nuisance, and we will not establish one here by concluding that the cost of treating the mine drainage is per se beyond the parameters of reason or the equivalent of a taking of its property . . . ." 23 Pa. Commonwealth Ct. at 511-512, 353 A.2d at 480; A. 113-114; *affirmed,* 371 A.2d at 468; A. 129-130.

Accord, Goldblatt v. Hempstead, 369 U.S. 590 (Zoning ordinance upheld as constitutional because of a "dearth of relevant evidence" concerning such things as "the availability and effectiveness of other less drastic protective

steps, and the loss which appellants will suffer from the imposition of the ordinance.")[5,6]

Barnes & Tucker's failure to adduce any evidence to sustain its claim of unconstitutionality is especially fatal to its case in light of Pennsylvania's compelling interest in preventing the destruction of its waterways from acid mine drainage (see §A, supra) and in preventing the major threat to Pennsylvania's waters specifically posed by the polluting discharge from Mine No. 15.

As the chancellor found and the Pa. Supreme Court affirmed:

> ". . . As measured against the deleterious impact of the untreated mine water entering the waters of the Commonwealth upon the health, safety and welfare of the citizens of the Commonwealth, not to mention the less obvious impact upon the environment

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[5] In contrast to the instant case—which involves the clearest possible public interest in the abatement of a highly polluting nuisance—*Goldblatt* involved an at best marginal public interest—an exercise of the zoning powers to prohibit the continuation of a long-established, non-polluting business enterprise. The court, nevertheless, emphasized in *Goldblatt* that, at the minimum, specific, detailed and persuasive evidence had to be adduced to support a claim of unconstitutionality of police power regulation.

[6] Barnes & Tucker's failure to adduce evidence to support its claim makes any further discussion of the relationship between the police power and eminent domain unnecessary. We note, however, that the instant case has none of the attributes of eminent domain—for example, the appropriation of property by the state. Rather, the instant case involves the requirement that a public nuisance under both common law and statutory law be abated. *See generally Mugler v. Kansas,* 123 U.S. 623; *Bosselman, et al., The Taking Issue* (1973), esp. 197-199.

in general, Barnes & Tucker falls far short of the burden required of it to preclude entry of an abatement order on constitutional grounds."[7,8] 23 Pa. Commonwealth Ct. at 512, 353 A.2d at 480; A. 114; *affirmed,* 371 A.2d at 468; A. 129-130.

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[7] Barnes & Tucker has never challenged the appropriateness of the Duman Dam facility as the relief in this case. Indeed, Barnes & Tucker itself agreed to construct and operate the Duman Dam facility as part of a stipulation it entered into with the Commonwealth and continues to operate it. 371 A.2d at 464; A. 121-122.

[8] As part of its attempt to substitute rhetoric for specific and persuasive evidence, Barnes & Tucker states that the treatment of its discharge will be "perpetual". To the contrary, the court below found in accord with scientific principles that the mine will cleanse itself (i.e., the acid producing material will leach out) over time. 23 Pa. Commonwealth Ct. at 508, 353 A.2d at 478; A. 110. In any event, the court below pointed out that ". . . the chancellor, in fashioning the abatement relief, has before him no alternatives and must order abatement by . . . [the Duman Dam facility], subject, of course, to future modification of the abatement order upon proper proof and showing of feasibility of an alternative course of action." 23 Pa. Commonwealth Ct. at 502, 353 A.2d at 475; A. 103.

C. The Fact That Acid Mine Drainage Discharges in Pennsylvania Have Been at All Times Subject to Abatement as Common Law Public Nuisances Precludes Barnes & Tucker From Prevailing on the Merits

As part of Barnes & Tucker's unsupported scattershot allegations that it is unconstitutional to require it to treat the discharge from its Mine No. 15, Barnes & Tucker claims that such a requirement is unconstitutionally retroactive.

Barnes & Tucker's claim is stillborn since one of the independent bases of Barnes & Tucker's liabiiity in this case is common law public nuisance. 455 Pa. at 408, 319 A.2d at 880; A. 85. As the Pa. Supreme Court dispositively stated, discharges of acid mine drainage have been a common law public nuisance in Pennsylvania at all times.[9] 455 Pa. at 417; 319 A.2d at 884; A. 94. Because liability for such discharges has at all times existed under Pennsylvania common law, there is no question of retroactivity in this case.

As the Pa. Supreme Court also found, the relief requested and granted in this case was, in any event, directed towards preventing the reoccurrence of a public nuisance and was thus prospective, not retrospective in nature. 455 Pa. at 408, 417-418, 319 A.2d at 880, 884-885; A. 86, 94-95.

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[9] In any event, as the Pa. Supreme Court also dispositively stated, under well-established principles of Pennsylvania law ". . . stream polluters can acquire no prescriptive or property right to pollute as against the Commonwealth . . . [citations omitted]." 455 Pa. at 415, 319 A.2d at 884; A. 92-93.

D. The Abatement of Post-Mining Polluting Discharges by Definition Always Involves Imposing Obligations on Currently Inactive Operations

Barnes & Tucker in its Jurisdictional Statement (e.g., at 27) places great emphasis, as it did below, on the argument that Pennsylvania's requirement that Barnes & Tucker abate the polluting discharge from its Mine No. 15 represents an unconstitutional "taking" because the property is not currently economically productive and the regulation results in a so-called "negative worth" upon the property. This argument ignores the nature of mining or, more precisely, is cynically designed to take advantage of it and would confer upon coal mining and similar operations a constitutional right to pollute to the extreme detriment of Pennsylvania's public and industry.

By definition, coal mining involves the extraction of a non-renewable resource. Generally speaking, the more one extinguishes (or destroys) the resource, the more profit one makes. At the same time, by far the greatest pollution hazard from underground coal mines in Pennsylvania is the pollution which occurs after mining and all mining operations have ceased and water accumulates in the mine to its maximum extent. Thus it is apparent that Barnes & Tucker's argument concerning the lack of current economic value to Barnes & Tucker of Mine No. 15 represents no more than a circular, self-serving "take the money and run" theory specifically tailored to serve Pennsylvania's coal operator to the detriment of Pennsylvania's public interest. The operator "destroys" the resource and in so doing makes a profit. Then when the serious public nuisance of post-mining pollution results from its operation,

the operator claims it is exculpated from abating the nuisance because the operation is completed and is not currently economically productive.

Specifically, the "take the money and run" theory which Barnes & Tucker advocates would elevate to a constitutional principle the pollution of additional thousands of miles of streams in Pennsylvania. As the Pa. Supreme Court stated in its opinion in this case, ". . . [t]he Act [the Clean Streams Law] does not grant any preferred status to mine owners and operators in the discharge of pollutants into Pennsylvania waters." 455 Pa. at 413, 319 A.2d at 883; A. 91.

Indeed, not only coal mining, but other common activities in Pennsylvania combine the potential for extremely deleterious polluting discharges with the phenomenon that their most harmful discharges come after the operation is completed. Coal refuse piles and solid waste disposal areas (with their post-operational leachate discharges) are two examples of such activities. Post-operational polluting discharges from these activities are among the most serious pollution problems in Pennsylvania. These serious post-operational discharges occur, by definition, at a time when the operations are not economically productive. It would thus be a fatal blow to water pollution control in Pennsylvania if the absurd position were accepted that it is unconstitutional to require the treatment or abatement of discharges resulting from operations which are no longer economically productive.[10]

[10] Barnes & Tucker also throws into its Jurisdictional Statement the argument that because some of the drainage which discharges into the waters of Pennsylvania from its Mine No. 15 flows through other mines into Mine No. 15, it should be exculpated from abating its discharge.

CONCLUSION

For the foregoing reasons, Appellee moves that this Appeal be dismissed or, in the alternative, that the Opinion of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,
K. W. JAMES ROCHOW
Assistant Attorney General
Counsel for Appellee, Commonwealth of Pennsylvania

In the first place, this issue has already been settled. As the Pa. Supreme Court noted in *Barnes & Tucker II*, the consolidated cases of *Harmar and Pittsburgh Coal Companies* dispositively held that "mine drainage does not cease to be mine drainage once mining has ceased in the mine from which it continues to drain" and that the nuisance to be remedied is the *discharge* into Pennsylvania's waters from the mine (in this case, Mine No. 15). 371 A.2d at 466; A. 126-127. The Court dismissed the coal companies' appeals from that decision because they presented no substantial federal questions. 415 U.S. at 903.

Barnes & Tucker's specious "sources of water" argument must in any event fail because, as the chancellor found and the Pa. Supreme Court affirmed, it was Barnes & Tucker's conduct in its mining activity which caused the discharge to occur. 371 A.2d at 466-467; A. 127.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-44

BARNES & TUCKER COMPANY,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE NATIONAL COAL ASSOCIATION, THE NATIONAL INDEPENDENT COAL OPERATORS' ASSOCIATION, THE KEYSTONE BITUMINOUS COAL ASSOCIATION, AND THE AMERICAN MINING CONGRESS, AS AMICI CURIAE

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The National Coal Association, the National Independent Coal Operators' Association, the Keystone Bituminous Coal Association, and the American Mining Congress herewith respectfully request leave to file their attached brief as *amici curiae* in support of the Jurisdictional Statement filed by appellant herein.

These respective associations, and their members, have a direct and urgent interest in the issues presented here. The decision of the Pennsylvania Supreme Court from which this appeal is taken deals with new and previously uncharted areas

respecting the exercise of State power to retroactively apply recently adopted environmental laws to inactive mine properties which were abandoned prior to enactment of such laws.

While these issues are effectively treated in appellant's Jurisdictional Statement, it is the purpose of this *amicus* brief to convey to the Court the far-reaching consequences which may radiate from the decision of the Court below. If the power of a state to retroactively impose economic liability upon an industry is not governed and controlled by reasonable rules of due process the ability of the managers of an enterprise to make sound and rational decisions respecting conduct of its affairs becomes impossible. It is hardly necessary to emphasize that the vigor of the national economy requires an industrial climate which encourages adequate capital investment for development of natural resources. When a state, as in this case, by retrospective legislation imposes unreasonable and unduly oppressive economic burdens upon one of its most essential industries the industry must look to this Court for a determination as to whether the state action constitutes a taking of property without due process of law.

Counsel for *Amici* has obtained the consent of the appellant for the filing of this *amicus curiae* brief, but the Assistant Attorney General of Pennsylvania has declined to grant consent.

Respectfully submitted,

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INTERESTS OF AMICI CURIAE

The National Coal Association is a voluntary nonprofit association representing coal mining companies which produce almost one-half of the annual coal production in the United States. The National Independent Coal Operators Association is a nonprofit association of small and medium-sized coal producers located primarily in the Appalachian coal regions of

Pennsylvania, West Virginia, Kentucky, Ohio and Virginia. The Keystone Bituminous Coal Association is a nonprofit association representing coal mining companies operating in the State of Pennsylvania. The American Mining Congress is a nonprofit association comprised of mining companies which produce a major proportion of the nation's minerals, including coal, metals, and non-metallic industrial and agricultural minerals. The basic purpose of *amici* is to represent the interests of the mining industry and to cooperate with public authorities in dealing with problems that affect mining.

The issues which are involved here have broad implications for the mining industry as a whole. From the standpoint of the industry it is important that the Court provide answers to the question of whether and to what extent a state may, under newly-adopted environmental statutes, impose upon a mining company the obligation to abate post-mining conditions which develop and manifest themselves years after mining operations have ceased, and which are not attributable to fault or negligence of the mine operator.

•

THE QUESTIONS ARE OF GREAT IMPORTANCE TO THE MINING INDUSTRY

For well over a hundred years mining practices in Pennsylvania, as well as in other states, were carried on in accordance with statutory standards and social, political and governmental policies which permitted, and, indeed affirmatively sanctioned the discharge of mine waters into streams and waterways which were not the source of public water supplies.[1]

[1] See, e.g. *Pennsylvania R.R. v. Sagamore Coal Co.*, 281 Pa. 233, 126 A.386 (1924).

In the mid 1960's a shift in public attitudes resulted in a rewriting of the established body of laws and enactment of legislative changes which have imposed a multitude of new environmental standards upon industry generally, and the mining industry in particular. As a consequence, environmental considerations are a controlling factor in every management decision which a mining company must make in respect to its day-to-day operations, as well as in planning for its future activities.

This is not to say that it should not be so. But it is important that those who have responsibility for such management decisions should know the rules of the game, and that they should have some assurance that a course of action which they follow in reliance upon existing laws and regulations will not later bring down upon them unforeseen liabilities of disastrous proportions because the state later changes the rules or imposes new duties by subsequent legislative acts.

Put in another way, there has been a shifting perspective between what was permissible and even welcome during periods when the state was actively encouraging development of its mineral resources, and what is permissible and welcome in 1977. The benefits which the state and its citizens derived from industrial development were almost universally regarded during past periods as justifying and outweighing incidental damage to the air, land or water, but today the conditions which followed as a consequence of these past governmental policies are now being classified as public nuisances which a mining company must abate at enormous and unanticipated cost.

The question is not whether the legislatures have gone too far or too fast in their efforts to protect the environment, it is rather a question of whether under newly-adopted environmental laws a state may require a company to take action to abate conditions arising out of past industrial

activities which were in all respects legal and proper at the time they took place, where there was full compliance with then-existing statutory requirements and standards, and where no fault or negligence, or foreseeability can be attributed to the company.

IT IS IMPORTANT TO DEFINE THE PARAMETERS WITHIN WHICH A STATE MAY, BY POST-FACTO LEGISLATION, REQUIRE ABATEMENT AS A PUBLIC NUISANCE THAT WHICH WAS REGARDED AS LAWFUL AND ACCEPTABLE AT THE TIME ACTIVE MINING OCCURRED.

There is a pressing need for clarification of the constitutional limits of a state's power to require mining companies, or other industrial enterprises, to return to old and abandoned facilities and, regardless of cost, abate conditions which were theretofore not recognized or considered as public nuisances or contrary to the general welfare of the state and its citizens.

The situation presented in this case typifies the problem. Under the established legal and public policy considerations which prevailed in Pennsylvania prior to the most recent amendments to the Clean Streams Law, Act of June 22, 1937, as amended, 35 P.S. sec. 69.1 et seq., the discharge of acid mine drainage into streams was not recognized as a nuisance, either public or private. The controlling public policy of the state during previous periods was expostulated in the landmark case of *Pennsylvania Coal Company v. Sanderson*, 113 Pa. 126, 6 A.453 (1886) in which the Court said:

> "The right to mine coal is not a nuisance in itself. It is a right incident to the ownership of coal property, and when exercised in the ordinary manner and with due care the owner cannot be held for permitting the natural flow of mine water over his own land, into the water course, by means of which the natural drainage of the country is effected.
>
> * * *
>
> The discharge of this acidulated water is practically a condition upon which the ordinary use and enjoyment of coal lands depends; the discharge of the water is therefore part and parcel of the process of mining, and as it can only be effected through natural channels, the denial of this right must inevitably produce results of a most serious character to this, the leading industrial interest of the state.
>
> The defendants were engaged in a perfectly lawful business, in which they had made large expenditures, and in which the interests of the entire community were concerned; they were at liberty to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control; as the mining operations went on, the water by the mere force of gravity ran out of the drifts and found its way over the defendant's own land to the Meadow Brook. It is clear that for the consequence of this flow, which by the mere force of gravity, naturally, and without any fault of the defendants, carried the water into the brook and thence to the plaintiff's pond, there could be no responsibility as damages on the part of the defendants." 113 Pa. at 146-47, 6 A. at 457.

Only where it could be shown that the discharge of acid mine drainage entered into a "pure stream" which was the source of a community's water supply, did the Pennsylvania courts recognize the existence of a public nuisance. *Pennsylvania Railroad v. Sagamore Coal Company*, 281 Pa. 233, 126 A. 386 (1924).

In the present case there was no showing that the drainage from Mine No. 15 entered "clean streams", but rather entered waters which were already heavily polluted by sewage and drainage from other mines. As noted by the court in the Second Commonwealth Court Opinion (App. 65)

"The waters of the Commonwealth here in question are and for a long period of time have been polluted by sewage and acid mine drainage from closed or 'abandoned' mines. Except for some developing recreational uses there is no evidence that these waters in their polluted state are used for public purposes. Nor do we have in this case facts supporting concepts of negligence, foreseeability or unlawful conduct, being elements of seemingly persuasive force in some of the cases.

* * *

For better than one hundred years the State has chosen to regulate mining and there is no credible evidence in this case that Mine No. 15 was not operated and eventually closed consistent with statutory law, regulation or licenses issued pursuant thereto."

The Second Commonwealth Court Opinion also presents a review of the applicable statutory and regulatory provisions enforced by the State of Pennsylvania during the respective periods the mine was in active operation. (App. 32-39). Briefly summarized, the statutes governing mine drainage are described as follows:

The initial Pennsylvania statute dealing with pollution of streams, which was known as the Purity of Waters Act of 1905, dealt with the discharge of sewers into the waters of the Commonwealth, but significantly provided in section 4 that it was not to apply to "waters pumped or flowing from coal mines." App. 32.

A 1923 statute which empowered the Department of Health to promulgate regulations for the protection of the water supply and prevent pollution, specifically provided that it was not to apply to ". . . any pollution or contamination caused by or resulting from water pumped from or flowing from coal mines or water used in the preparation of coal." Ibid.

The Clean Streams Law enacted in 1937 expressly excluded from the prohibition on industrial wastes ". . . acid mine drainage from coal mines . . ." App. 33.

In 1945 the Clean Streams Law was extensively amended so as to include coal mines within its coverage, and to prohibit discharge of acid mine drainage into "clean waters", with the proviso that ". . . the provisions of this article shall not apply to acid mine drainage from coal mines until such time as, in the opinion of the Sanitary Water Board, practical means for the removal of the polluting properties of such drainage shall become known." Ibid. Coal mines were required, however, to submit a proposed drainage plan to the Sanitary Water Board for approval.[2]

It is important to note that these statutory provisions dealt only with discharge of acid mine drainage into "clean" waters. It was not until the adoption of the 1965 amendments to the Clean Streams Law that the different treatment accorded the discharge of acid mine drainage into "clean" and "unclean" waters was eliminated, and the Sanitary Water Board was given regulatory powers over all such discharges.

On July 31, 1970, a full year after Mine No. 15 was permanently sealed in accordance with applicable law, the Clean Streams Law was again amended to provide, in pertinent part, that

"A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1, 1966, under circumstances requiring a permit from the Sanitary Water Board under the provisions of Section 315(b) of this act as it existed under the amendatory act of August 23, 1965. (P.L. 372)."

This amendment also transferred the powers of the Sanitary Water Board to the Department of Environmental Resources, which agency proceeded to retroactively revoke the permits which had been issued to Barnes and Tucker with respect to

[2] Barnes and Tucker fully complied with this requirement, and was issued permits by the Sanitary Water Board. (App. 78, 79).

discharge of water from Mine No. 15, and brought suit to compel the company to continually treat, in perpetuity, not only the natural percolation from Mine No. 15, but also millions of gallons of water which flow through the mine from other active mines located at higher elevations.

THE DECISION OF THE PENNSYLVANIA SUPREME COURT RAISES SERIOUS DUE PROCESS QUESTIONS.

In holding Barnes & Tucker liable under statutes adopted after its mining operations had ceased, the Pennsylvania Supreme Court reasoned that the 1965 amendments to the Clean Streams Law put the company on notice that its mine drainage permits were subject to change and that the applicable statutory authority for its permits might later be amended, and, accordingly, Barnes and Tucker was forewarned that amendments might be passed after the mine was closed which would subject it to liability. First Pennsylvania Supreme Court decision, App. 95.

This reasoning of the Court is deficient in at least two respects. First, there was essentially no due process notice as to what the amended law would be. Even a statute which is actually on the books must be sufficiently clear so as to provide notice of what conduct is proscribed. See, *Rabe v. Washington*, 405 U.S. 313, 315, 31 L.Ed.2d 258 (1972). It is clearly much more offensive to due process to hold that a litigant is bound by a statute or amendment not even in existence when he acted.

Second, the rationale of the Pennsylvania Supreme Court is defective because it presumes that Barnes and Tucker has a continuing or prospective involvement in the discharge from the mine. Such is not the case. While it is true that the gravity discharge is continuing (and in that sense prospective), there is no continuing activity by Barnes and Tucker. As

noted by the Commonwealth Court, "[F]actors of a present activity on the part of the owner or user of the land or of a course of conduct directly producing the deleterious result are absent in this case." (App. 65)

The second basis for holding Barnes and Tucker liable was the Pennsylvania Supreme Court's unusual application of nuisance law. First the Court overruled the long-standing case of *Pennsylvania Coal Company v. Sanderson, supra,* which held that acid drainage from a coal mine did not constitute a nuisance, (First Pennsylvania Supreme Court Opinion, App. 88), and passed over without consideration the finding of the Commonwealth Court that "The mine water discharge from Mine No. 15 after cessation of mining does not constitute a public nuisance under Section 3 of the Clean Streams Law as then in effect for which Barnes and Tucker is presently responsible." (App. 67). The Supreme Court presumed current harm to the waterways which the Commonwealth Court found to be already polluted by sewage and industrial waste (App. 65), and found sufficient public interest by reference to an Amendment to the Pennsylvania Constitution enacted subsequent to the time Barnes and Tucker ceased operations and sealed Mine No. 15–an Amendment which the Pennsylvania Supreme Court itself has held is not "self-executing" so as to allow the government to act against individuals. *Commonwealth v. Gettysburg Battle Tower Inc.*, 454 Pa. 193, 311 A.2d 588 (1973). Thus, the Pennsylvania Court held Barnes and Tucker liable forever in the future for actions consummated prior to adoption of legislation establishing any liability, and upon an alleged violation of a public interest created by a constitutional amendment adopted two years after the date Barnes and Tucker Company discontinued its mining activities.

The rule of *Lawton v. Steele*, 152 U.S. 133, 38 L.Ed. 385 (1894) establishing the proper constitutional standard for evaluating the propriety of a statute enacted under the police

power is still applicable law. To pass constitutional muster a regulation promulgated under authority of the police power must use "... means [that] are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." 152 U.S. at 137. Here the imposition of liability is unreasonable for there has been no opportunity for Barnes and Tucker to avoid the charged violation inasmuch as its mining activities were completed before the condition was declared unlawful. Moreover, the State has not advanced any sound reasons as to why a different rule of liability should be imposed upon the former operator of this particular mine than upon the former operators of the multitude of other abandoned mines which are draining into the same streams, and contribute by far the greatest part of the pollution. Accordingly, in order to adopt the most reasonable means of dealing with the problem, and to avoid an unduly oppressive result, the State has authority under P.L. 1075, 35 P.S. §760.1 et seq., to assume direct responsibility for the water discharged from Mine No. 15 in much the same manner as it has assumed responsibility for drainage from other abandoned mines.[3]

There is no doubt that the imposition of an open-ended liability upon Barnes and Tucker to continue to treat the waters flowing from the mine is a "taking" of property within

[3] It should also be noted that Pennsylvania has dealt with the deferred social cost of surface mining by Section 18 of the Pennsylvania Surface Mine Reclamation Act. P.L. 1198, 52 P.S. §1396.18 which creates a Surface Mine Conservation and Reclamation Fund funded by monies from currently active operations to reclaim surface mines abandoned before the date of the Reclamation Act. The new Federal Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, sections 401 and 402, creates a reclamation fund to be derived from industry-wide assessments of 35 cents a ton on surface mined coal, and 15 cents a ton on deep-mined coal, to reclaim areas of abandoned coal mines, including the abatement of mine drainage from deep mines as well as from surface mines.

the meaning of the Due Process Clause. *Lawton v. Steele, supra.* Its effect is to create a negative worth factor in respect to inactive and sealed mines, and may very likely have the effect of discouraging the future development of mines to produce much needed energy, particularly where the coal deposits are in the vicinity of abandoned mines.[4]

The Pennsylvania Court's decision, if allowed to stand, could well become a legal precedent affecting other types of situations in which retrospective legislative action declares unlawful or in violation of the public interest conditions resulting from industrial activity which was in every respect lawful and proper under the laws in effect when the activity occurred.

The issues involved in this case are issues of the utmost gravity, affecting hundreds, and even thousands, of companies engaged in coal mining and other mining activities as well. Until these questions are answered mine managers will be unable to make operational decisions in an atmosphere unclouded by doubt as to their ultimate legal consequences, and each such decision will remain, in the words of the Melancholy Prince,

> *"sicklied o'er with the pale cast of thought;*
> *and enterprises of great pith and moment,*
> *with this regard, their currents turn awry."*

[4] Pennsylvania and the general Appalachian coal producing areas have thousands of abandoned underground mines. As of 1966, the United States Environmental Protection Agency estimated that there were approximately 67,613 abandoned coal mines in the United States which have a discharge flowing from them. U.S. Environmental Protection Agency, *Inactive and Abandoned Underground Mines, Water Pollution Prevention and Control* Table 1.01-1, p. 6 (1975).

For the foregoing reasons it is respectfully urged that the Court note probable jurisdiction to review the judgement from which this appeal is taken.

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COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal From the Supreme Court of Pennsylvania, Middle District.

[redacted]OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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MOTION IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Commonwealth of Pennsylvania, Appellee, moves that this Court deny for the following reasons the motion of the Keystone Bituminous Coal Association *et al.* ("Coal Associations") for leave to file a brief as *amici curiae* in support of the Jurisdictional Statement filed by Barnes & Tucker Company ("Barnes & Tucker"), Appellant.

ARGUMENT

Motions To File Amicus Briefs Prior to Consideration of Jurisdictional Statements Are Not Favored

Rule 42 (1) of the rules of this Court states that motions for leave to file *amicus* briefs prior to consideration of jurisdictional statements "are not favored". Coal Associations' motion gives no reasons whatsoever why this strong presumption against the filing of *amicus* briefs prior to consideration of jurisdictional statements should not be applied in this case.

Coal Associations' Motion Is Out of Time

Rule 42 (1) of the rules of this Court also states that motions for leave to file *amicus* briefs prior to consideration of jurisdictional statements "may be filed *only* if submitted *a reasonable time* prior to the consideration of the jurisdictional statement" (emphasis added).

Barnes & Tucker's Jurisdictional Statement was filed on July 5, 1977.

Coal Associations, however, did not submit their motion for leave to file an *amici* brief until on or about September 13, 1977, and did not serve their motion on opposing counsel until September 15, 1977, a delay of two and one-half months. Coal Associations' motion does not even attempt to explain this unreasonable delay.

No Amicus Briefs Were Filed Below

No coal company, association or any other party requested to file an *amicus* brief at any stage of the proceedings below.

It is especially noteworthy that even the one moving *amicus* which represents certain of Pennsylvania's mine operators—the Keystone Bituminous Coal Association—did not attempt, until the Coal Associations' very-last-minute motion, to in any way participate at any stage of the proceedings below or in this Court.

Coal Associations' Motion Is Redundant

The arguments which Coal Associations' dilatory motion asks this Court to consider are the same ones raised in Barnes & Tucker's Jurisdictional Statement. Therefore, any *amici* brief filed by Coal Associations would be redundant, burdensome, unhelpful, and unnecessary to the consideration of the jurisdictional statement in this case.

Coal Associations' Motion Is Irrelevant to This Case Because the Arguments It Asks This Court To Consider Would Require This Court To Act as a Pennsylvania Appellate Court and Even Sit as a Chancellor in Equity

Coal Associations' motion assumes and depends upon factual findings and legal findings on points of Pennsyl-

vania law which are contrary to the dispositive findings of the Pennsylvania Supreme Court ("Pa. Supreme Court") in this case.

For example, Coal Associations' motion claims that the decision below raises the question of the application of "recently adopted environmental laws". It raises no such question. The Pa. Supreme Court dispositively found that Pennsylvania's common law of public nuisance—one of the independent bases of Barnes & Tucker's liability in this case—*at all times* provided for the abatement of acid mine drainage discharges.[1] 455 Pa. at 417, 319 A.2d at 884; A. 94. Coal Associations' motion, like Barnes & Tucker's Jurisdictional Statement, simply ignores this dispositive finding and, instead, raises exactly the same arguments on this point of Pennsylvania law which Barnes & Tucker presented below and which the Pa. Supreme Court rejected.[2],[3]

[1] Moreover, Barnes & Tucker itself recognized its responsibilities in abating discharges of mine drainage when it represented under oath to the Commonwealth that it would seal all mine openings in a watertight manner to prevent post-mining discharges. Despite this sworn representation, Barnes & Tucker's polluting discharge first occurred from a borehole which Barnes & Tucker never sealed. 9 Pa. Commonwealth Ct. 1, at 15, 303 A.2d at 551; A. 22-23, 26-27.

[2] In any event, as the Pa. Supreme Court also dispositively stated, under well-established principles of Pennsylvania law ". . . stream polluters can acquire no prescriptive or property right to pollute as against the Commonwealth . . ." (citations omitted.) 455 Pa. at 415, 319 A.2d at 884; A. 92-93.

[3] Without reaching the merits of Coal Associations' proposed *amici* brief, we further note that it also asks this Court to consider the very same arguments on points of Pennsylvania law which Barnes & Tucker presented below and which the Pa. Supreme Court rejected.

Coal Associations' motion also bleats about burdens Pennsylvania is allegedly placing upon "one of its most essential industries". Even assuming, contrary to established principles and practice, that this Court can and should inquire into the social merits of a state police power regulation, Coal Associations' vaguely proposed argument has no support of any kind in the record. Because the Pennsylvania courts specifically found that Barnes & Tucker failed to adduce any evidence whatsoever regarding the economic impact upon the company itself of the requirement to abate the polluting discharge caused by its mining activity, 23 Pa. Commonwealth Ct. 496, at 511-512, 353 A.2d at 480; A. 113-114; 371 A.2d at 468; A. 129-130, any argument that the requirement has an impact upon Barnes & Tucker, much less any wider impact, is completely unsupported by the record.

Coal Associations' Motion Is Irrelevant to This Case Because the Arguments It Asks This Court To Consider Would Require This Court To Act as the Pennsylvania Legislature

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Most importantly, Coal Associations' dilatory motion, like Barnes & Tucker's Jurisdictional Statement, does not in any manner propose to make arguments challenging the interest of Pennsylvania's public and industry in abating discharges of acid mine drainage.

Moreover, Coal Associations' dilatory motion, like Barnes & Tucker's Jurisdictional Statement, does not in any manner propose to make arguments challenging the form of relief fashioned by the chancellor in this case. In-

deed, it cannot. Barnes & Tucker not only failed to present any evidence concerning alternative methods of abating its polluting discharge, 371 A.2d 461, at 468; A. 129-130, but itself chose and constructed the method of abatement according to the terms of a stipulation it entered into with the Commonwealth, 371 A.2d at 464; A. 121-122.

In short, the representations of Coal Associations' motion, like the arguments in Barnes & Tucker's Jurisdictional Statement, amount to nothing more than a request that this Court make the legislative decision that the requirements of Pennsylvania law regarding Pennsylvania's worst water pollution problem are unwise. As argued in the Commonwealth's Motion to Dismiss or Affirm, the correctness of these decisions of social policy is beyond the scope of this Court's review.

CONCLUSION

For the foregoing reasons, Appellee moves that this Court deny the Motion of the Keystone Bituminous Coal Association, *et al.*, for Leave To File a Brief *Amici Curiae*.

Respectfully submitted,
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